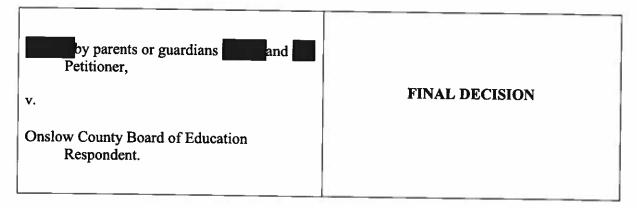
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## STATE OF NORTH CAROLINA

COUNTY OF ONSLOW

IN THE OFFICE OF ADMINISTRATIVE HEARINGS 17 EDC 00447, 17EDC00677



THIS MATTER was heard before the undersigned Honorable Stacey B. Bawtinhimer, Administrative Law Judge presiding, on the following dates: March 14-17, March 27-29, April 5-7, May 11-12, and May 15-16, 2017, at the Train Depot, 421 Court St., Jacksonville, North Carolina. After hearing the evidence presented and considering the written and oral arguments of counsel, the Undersigned is of the opinion that Respondent has not denied Petitioner a free and appropriate public education.

#### **APPEARANCES**

For Petitioners:

**Ann Paradis** 

The Law Office of Ann Paradis 301 Kilmayne Drive, Suite 102

Cary, NC 27511

For Respondent:

Carolyn A. Waller

Maura O'Keefe

Tharrington Smith, L.L.P.

150 Fayetteville Street, Suite 1800

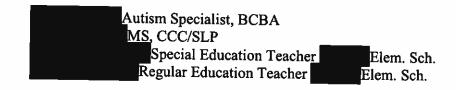
Raleigh, NC 27602

#### WITNESSES

For Petitioners:

MS, CCC/SLP
LCAW, MSW
Board Certified Behavior Analyst ("BCBA")
Director
Teacher
Petitioner and mother of

For Respondent:



## **EXHIBITS**

The following exhibits were received into evidence during the course of the hearing and have been retained as part of the official record of this contested case.

**Stipulated Exhibits ("Stip. Ex.")**: 1-6, 9, 11, 17, 19-27, 29-44, 47, 50-51, 54, 58-62, 65, 67, 75, 77-78, 81, 83-84, 86-88, 90, 92 (audio clip from 5:00-5:25; 29:30-34:20; 44:30-49:30; 2:07:30-2:17:20), 95-96, 100-101, 104-110, 117-118, 122, 127-130, 132, 134, 157-159, 166 (pp. 829-831), 165 (5:05-5:33), 167 (p. 878), 168 (pp. 886-889, 896, 901, 907-909, 910-916, 919, 921-922, 930, 933-936, 938, 950-952, 956, 964, 978, 982-983, 986, 992-994, 1019-1021, 1032, 1036-1037, 1040-1048, 1051-1053, 1068, 1090, 1092-1093, 1098-1099, 1101-1103, 1121-1123, 1137-1139, 1111), 169 (pp. 1145-1146, 1212, 1267-1269, 1334-1337, 1359-1372, 1574-1587, 1609-1613, 1661, 1668, 1675, 1681-1682, 1706), 170 (pp. 1774-1778 only), 171.

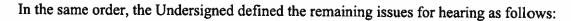
**Petitioners' Exhibits ("Pet. Ex."):** 2 (p. 3), 3-4, 10, 12, 18, 23, 26-30, 34-35, 37-40, 42-44, 61-62, 64-65, 66 (pp. 526-542, 544-551), 68, 71 (pp. 690, 709, 716-751, 753-54, 763-764), 74, 76-79, 82, 90, 93.

**Respondents' Exhibits ("Resp. Ex.")**: 1 (pp. 25-27, 31-32, 35, 57-58, 76-77, 81-82), 3 (audio clip from 03:38-03:36, 04:49-05:48); 4 (audio clip from 00:25-03:44); 8 (pp. 249-250, 291, 293, 326-327, 400, 402-413, 439-440, 457-459, 461, 463, 468, 470-471), 12, 15, 18 (pp. 585-590, 593-595, 627-628, 673-674, 690-703, 718-719).

Offer of Proof: Stip. Ex. 170, p. 1772. The Offer of Proof was not received into evidence but has been retained as a separate document separate within the official record for review purposes if necessary.

#### **ISSUES**

The parties identified the issues for hearing in the Pre-Trial Order. At the close of Petitioners' case-in-chief, Respondent moved pursuant to Rule 41(b) for dismissal of the case. In a written order following Respondent's motion for dismissal under Rule 41(b), the Undersigned dismissed the "Child Find" claim.



- I. Whether the IEPs developed and reviewed for 25, 2016 were appropriate, and if not, whether any such failure led to a denial of FAPE for ("IEP Issue");
- II. Whether the Board failed to implement the February 2, 2016 and February 25, 2016 IEPs, and if so, whether any such failure denied ISSUE');
- If Respondent did deny a FAPE in a. or b. above, whether is a placement reasonably calculated to provide educational benefit for that supports an award of tuition and travel reimbursement ("Private School Issue"); and,
- IV. If Respondent did deny a FAPE in a. or b. above, whether an award of compensatory education is appropriate ("Compensatory Education Issue").

# **BURDEN OF PROOF**

Petitioners acknowledged in the Prehearing Order entered on March 14, 2017, that they have the burden of proof in this contested case. Stip. 91-92. The standard of proof is by a preponderance of the evidence. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). North Carolina provides that actions of local boards of education are presumed to be correct and "the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. § 115C-44(b). The Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide free appropriate public education.

## Procedural Background

- 1. On May 6, 2016, and and filed a Petition against the Onslow County Board of Education ("OCS", "Respondent" or "Board") alleging violations of the Individuals with Disabilities in Education Act ("IDEA"). This initial petition was declared insufficient by order of this Tribunal on May 17, 2016.
- 2. Petitioners subsequently filed an Amended Petition for Contested Case Hearing ("Amended Petition"), 16-EDC-4738, on July 15, 2016, alleging violations of the Individuals with Disabilities in Education Act including failure to timely identify as a student with special needs and failure to properly implement his program once he was identified in January of 2016.

Two IEP meetings were held on February 2 and February 24, 2016. The IEP developed at the February 2 IEP meeting initial implementation date was February 8, 2016. The IEP developed at the February 24 IEP initial implementation date was February 25, 2016. For purposes of this decision and the issues, they are identified as the IEPs developed and reviewed on February 2 and February 25, 2016.

- 3. This case was initially scheduled for hearing on September 14, 2016, but was twice continued at the request of the parties, primarily on the basis that both parties were actively engaged in discovery. This Tribunal ultimately scheduled the hearing to begin on January 26, 2017.
- 4. On January 6, 2017, the matter was reassigned to the Honorable Stacey B. Bawtinhimer by Chief Administrative Law Judge Julian Mann, III.
- 5. On January 23, 2017, the parties held a pre-hearing conference during which counsel for the Respondent indicated that they would object to the introduction of any evidence at hearing challenging the appropriateness of IEP, on the grounds that this allegation was not made in the Amended Petition. Later that day, Petitioners filed a Third Petition, 17-EDC-0047, in which they alleged for the first time that the IEPs developed for were inappropriate. Petitioners also filed a Motion to Consolidate 16-EDC-4738 and 17-EDC-0447.
- 6. On January 25, 2017, Petitioners filed a Notice of Voluntary Dismissal with Prejudice of the Amended Petition, 16-EDC-4738, thereby rendering their Motion to Consolidate moot.
- 7. On February 2, 2017, Petitioners filed a Fourth Petition, 17-EDC-0677, in which they incorporated by reference the insufficient petition filed in May 2016 and the Amended Petition filed in July 2016. Petitioners also filed a Motion to Consolidate the Fourth Petition and the Third Petition, 17-EDC-0447. This Tribunal granted the Motion to Consolidate matters 17-EDC-0447 and 17-EDC-0677 on February 8, 2017.
  - 8. The matter was scheduled for hearing on March 14, 2017.
- 9. The hearing in this matter began on March 14, 2017, and ended on May 16, encompassing fourteen (14) days of hearing.

## **STIPULATIONS**

The parties proposed an Order on the Final Pre-Trial Conference, which was approved and filed in the Office of Administrative Hearings on February 20, 2017.

The parties stipulated to the following stipulated facts:<sup>2</sup>

## Jurisdictional, Party, and Legal Stipulations

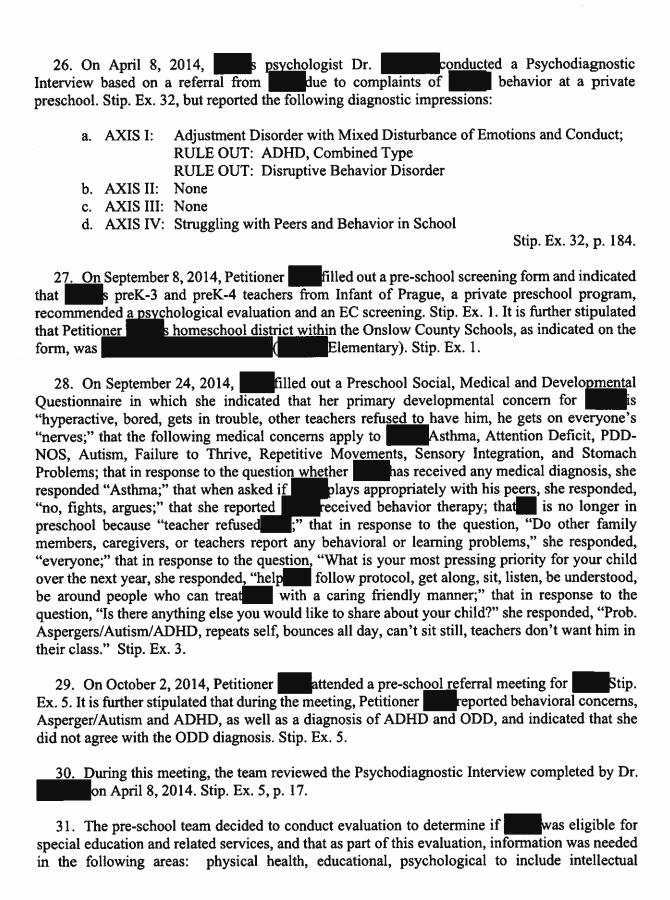
- 1. The Petitioners and Respondent named in this action are properly before this Tribunal, and that this Tribunal has personal jurisdiction over them.
  - 2. Petitioners and Respondent named in this action are correctly designated.

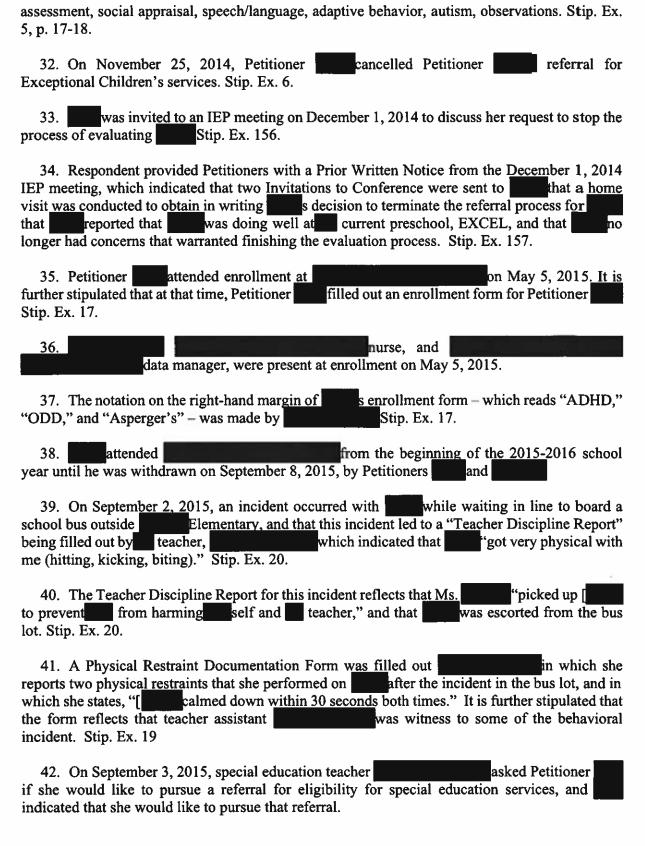
The introduction of each stipulated fact which states "It is stipulated that..." has been removed for readability.

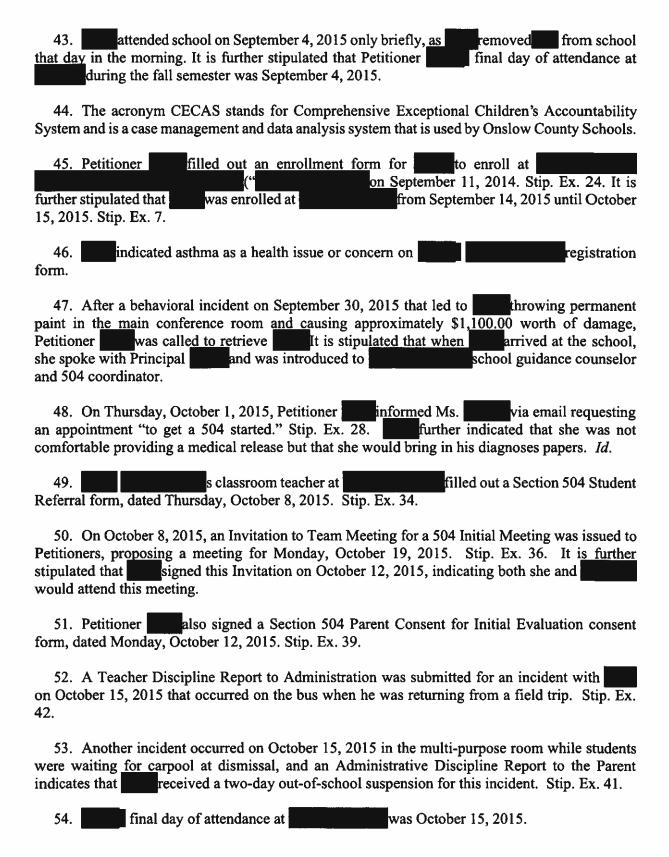
- 3. Petitioners are currently domiciled outside the boundaries of Onslow County.
- 4. As the party seeking relief, the burden of proof for this action lies with Petitioners. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005).
- 5. Petitioners have the burden of proof by the preponderance of the evidence. N.C. Gen. Stat. 150B-34(a).
- 6. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapter 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., and implementing regulations 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat 115C-109.6(a) control the issues to be reviewed.
- 7. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301.
  - 8. Respondent is a local education agency receiving monies pursuant to the IDEA.
- 9. The controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations, including the Policies Governing Services for Children with Disabilities.
- 10. Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition.
- 11. Petitioners are seeking compensatory education for their claim that Respondent failed to timely and appropriately evaluate and identify as a child with a disability under the IDEA, failed to offer him an appropriate IEP, and failed to implement the IEPs.
- 12. Petitioners' request for private school reimbursement is limited to the period of time in which was enrolled at from April-June, 2016.
- 13. Petitioners are seeking travel reimbursement from their place of residence to and from for the time period of April-June of 2016, as well as for the period of time from July 2016 when school resumed until October 26, 2016, a period of time in which Petitioners allege they continued to reside within the jurisdiction of the Onslow County Schools.
- 14. Petitioners are not seeking reimbursement for costs and expenses of any alleged homeschooling expenses for October 15, 2015 through February 9, 2016.
- 15. Petitioners are not raising any claims regarding occupational therapy, the OCS' occupational therapy evaluation conducted in January 2016, or the occupational therapy services provided to after the development of his IEP on February 2, 2016.

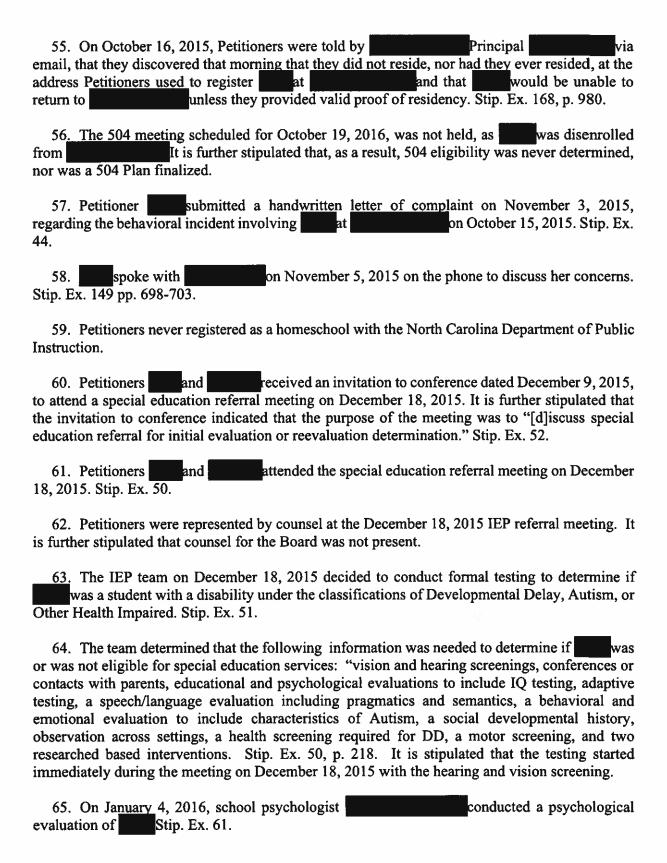
# Factual Stipulations

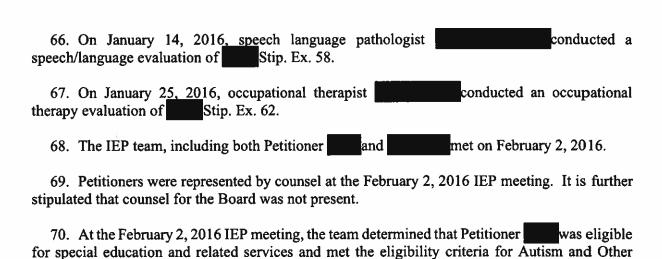
16. Petitioner and father is Petitioner was six (6) years old at the time of the filing of this petition.
17. Petitioner resides with mother and father at
18. The period of time at issue in this matter is the 2015-2016 school year, when was five years old and enrollment at various times throughout the year in kindergarten in the Onslow County Schools.
19. The following persons served in the following roles at the pertinent times of this petition:
a. Principal b. Assistant Principal c. Seneral Education Teacher d. Sexceptional Children's Teacher e. Special Education Teacher f. Data Manager g. classroom assistant
20. The following persons served in the following roles at during the pertinent times of this petition:
a.  Principal  b.  Regular Education Teacher  c.  Guidance Counselor and 504 Coordinator
21. a.k.a. a.k.a. is the Director of Exceptional Children's Services for Respondent
22. Respondent's School Psychologist who conducted psychoeducational evaluation in January 2016.
23. Respondent's Speech and Language Pathologist who conducted SLP evaluation in January 2016.
24. See See See See See See See See See Se
25. is an EC Instructional Coach for Respondent.











71. The IEP developed on February 2, 2016 indicates that the behavior that interferes with the learning, and that the behavior will be addressed through a behavior goal and a behavior support plan. Stip. Ex. 81, p. 401.

Health Impairment. Stip. Ex. 67, p. 313. It is further stipulated that during this meeting, the team developed an initial IEP and Behavior Support Plan, both effective on February 8, 2016. Stip. Exs.

81, 65-70

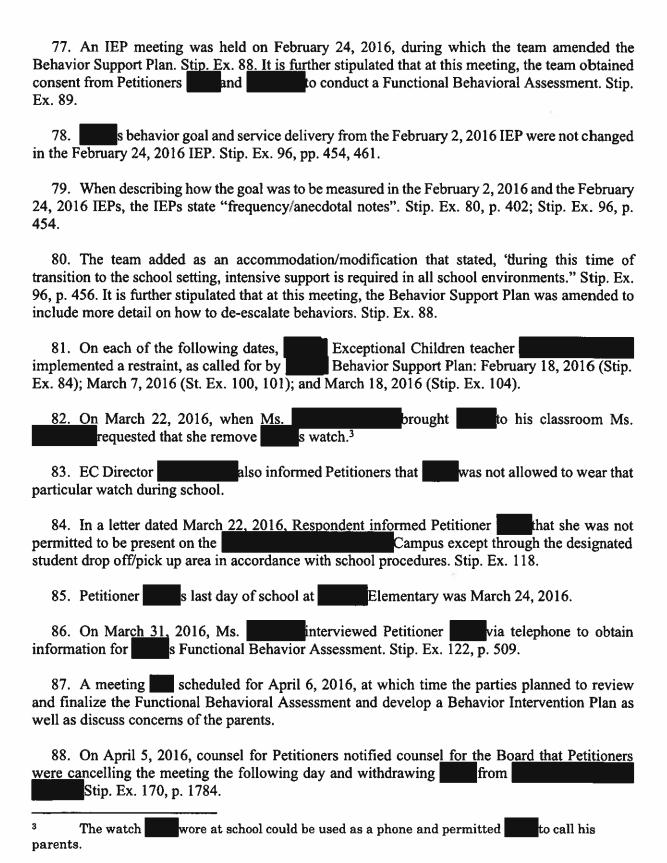
- functional goal in his February 2, 2016 IEP was as follows: "When pecomes upset, frustrated, or angry, he will use self-regulation/coping strategies (movement breaks, deep breathing, quiet space, deep pressure/heavy work activity, etc.) to avoid engaging in an aggressive or non-compliant behavior, with two or fewer verbal or visual reminders, on 4 out of 5 opportunities. Stip. Ex. 81, p. 402.
- 73. The service delivery in the IEP developed on February 2, 2016, was as follows (Stip. Ex. 81, p. 408):

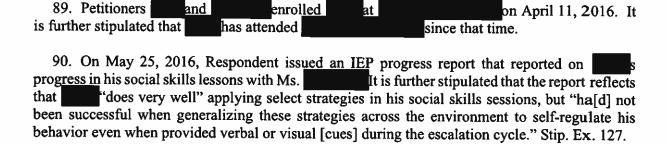
Type of Service	Sessions	Time per Session	Location of Services	
Social/emotional skills	5 per week	20 minutes	Exceptional Children Classroom	
Occupational Therapy (support description)	7 per reporting period	Unidentified amount of time	Total School Environment	

74. The Behavior Support Plan developed on February 2, 2016, included CPI restraint as an intervention strategy for the peak phase of the escalation cycle. Stip. Ex. 65.

<b>75</b> . 1	Petitioners re-enrolled	at	on February 9, 2016. S	tip. Ex.
82.				

76. Petitioners and received a copy of the Prior Written Notice from the February 2, 2016 IEP meeting. Stip. Ex. 74.





#### FINDINGS OF FACTS

At the start of the hearing in this matter, the parties agreed to Jurisdictional, Party, and Legal Stipulations and Factual Stipulations in a proposed Pretrial Order, which was approved and filed in the Office of Administrative Hearings on March 15, 2017.

This Order incorporates and reaffirms all findings of fact and conclusions of law contained in previous Orders entered in this litigation.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed the evidence presented and has assessed the credibility of the witnesses by taking into account the appropriate factors for determining credibility, including but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with other believable evidence in the case, including but not limited to verbal statements at IEP meetings, IEP meeting minutes, IEP documents, DEC 5/Prior Written Notices, and all other competent and admissible evidence.

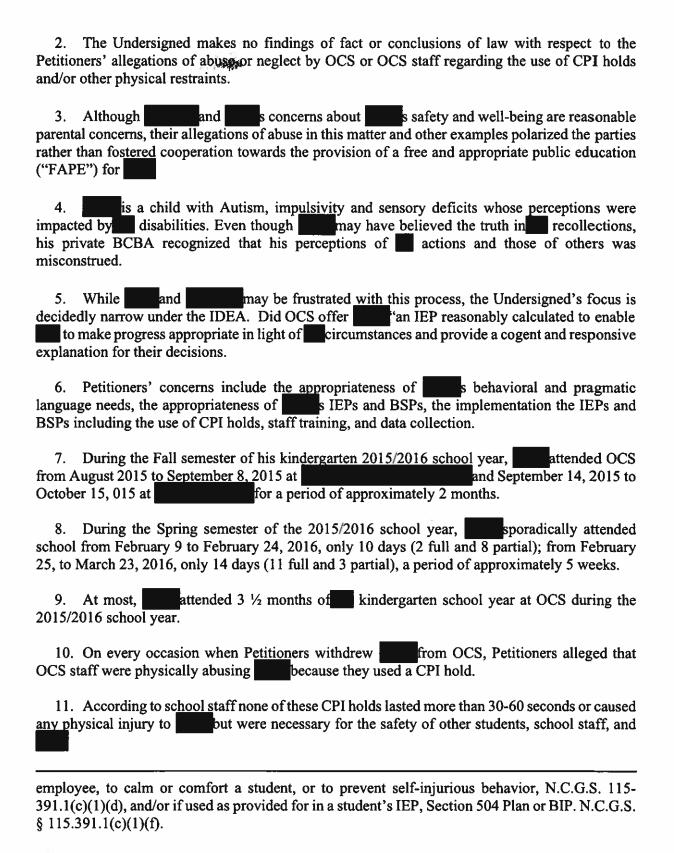
Based upon the stipulations of record and the preponderance of admissible evidence, the Undersigned finds as follows:

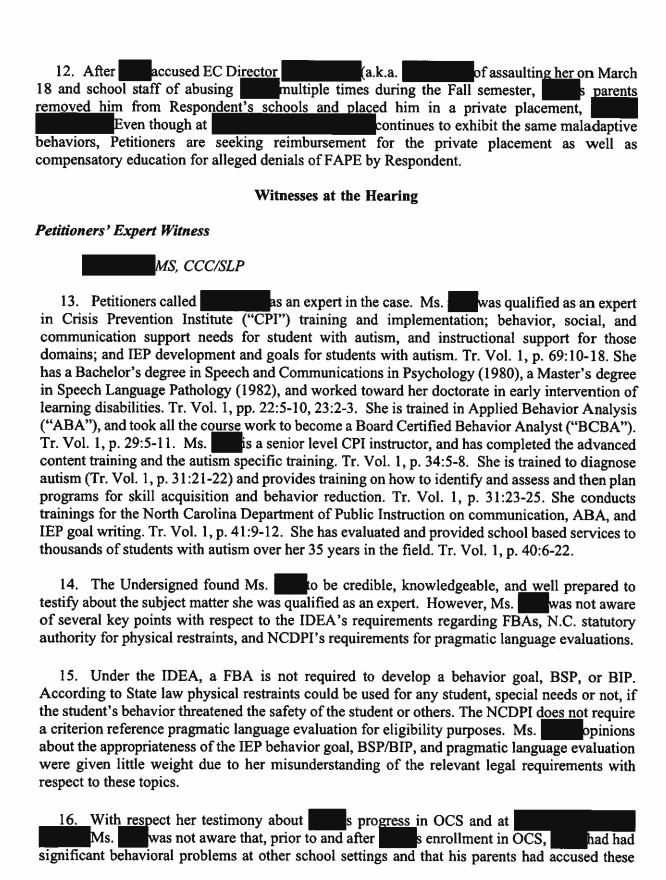
## General Findings

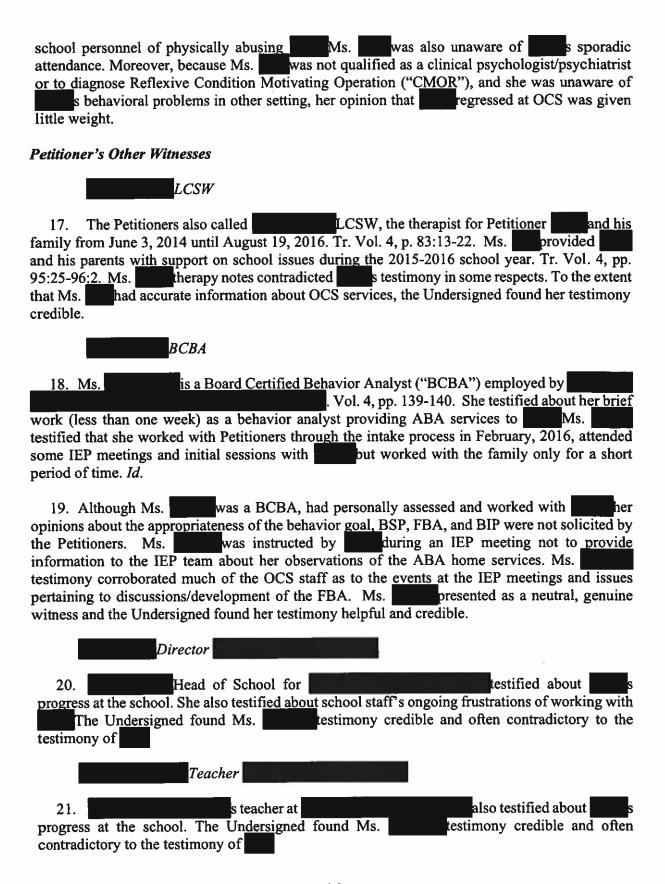
Overview

1. The parents' primary concern in this case is the appropriateness of the behavioral supports that received pursuant to his IEPs and Behavioral Support Plans, particularly the use of CPI holds ("Crisis Prevention Institute" now known as "Nonviolent Crisis Intervention")<sup>4</sup> which the parents vehemently opposed.

Physical restraint is defined as "the use of physical force to restrict the free movement of all or a portion of a student's body." N.C.G.S. § 115-391.1(b)(8). Physical restraint is considered a reasonable use of force when reasonably needed to secure the safety of any student, school







mother of

22. Important also testified as a fact witness for the Petitioners. As the mother of she has an explicit and implicit bias for the best interests of In addition to her bias, was hostile and evasive on cross-examination and had to be admonished multiple times to answer the School Board attorney's questions. Her prior accusations of abuse at school settings as well as at OCS, seemed sensational especially her accusation that OCS EC Director assaulted her by "bumping" into her. The Undersigned did not find to be credible and reliable in her testimony in general.

# Respondent's Witnesses

23. has worked as an educator for Onslow County Schools since 2003. Tr. Vol. 13, p. 25. She holds an undergraduate degree in K-6 elementary education, and a master's degree in the area of reading. Tr. Vol. 13, pp. 25-26. Ms. holds K-6 and special education licensures issued by the state of North Carolina; she has also obtained National Board Certification. Tr. Vol. 13, p. 26. Ms. has worked as a special education teacher for nearly eight years. and has served as a special education teacher at elementary for three years, Id. In addition to serving as a member of s IEP team, Ms. provided direct instruction to a near-daily basis. Ms. testified that she had personally reviewed teacher documentation notes, anecdotal notes, and other notes describing behavioral incidents from enrollment at both Based on her educational background. and qualifications, experience, and personal interactions with Petitioners, the Undersigned finds Ms. to be a credible witness as to the appropriateness and implementation of 2 and February 25 IEPs and BSPs as well as her recollection of interactions with the Petitioners.

24. has served as a teacher in Onslow County Schools for four years. Tr. Vol. 14, p. 22. Ms. currently teaches a third and fourth grade class at Id. at 21. For the last three years, however, Ms. kindergarten at *Id.* at 22. Ms. holds an undergraduate degree in elementary education and is licensed in K6 elementary education. Id. Ms. served as teacher during brief initial period of enrollment, at the start of the 2015-2016 school year, and during his enrollment in February and March of 2016. See Tr. Vol. 14, pp. 23 & 25. Based on her educational background, qualifications, experience, and personal interactions with Undersigned finds Ms. to be a credible witness with regard to the appropriateness and s February 2 and February 25 IEPs and BSPs. implementation of

## Respondent's Expert Witnesses

Kerry BCBA

a recently licensed BCBA who was previously employed by Respondent, was qualified as an expert in behavior management of students with autism and other special needs of students who have behavioral problems including the development of IEP behavior goals, behavior interventions plans, and functional behavior assessments, and applied behavior analysis ("ABA"). Tr. Vol. 11, p. 32:3-10. She was not involved with functional she conducted three observations of in February and March 2016, but provided extensive testimony regarding in February and March 2016, but provided extensive testimony regarding is IEPs. Tr. Vol. 11, pp. 33:22-33:1. In her capacity as an "autism specialist" within the district, she was solely responsible for the entire district comprising thirty-seven schools. Tr. Vol. 11, pp. 8:25;131:16-132:1. The Undersigned found her testimony credible regarding the appropriateness of

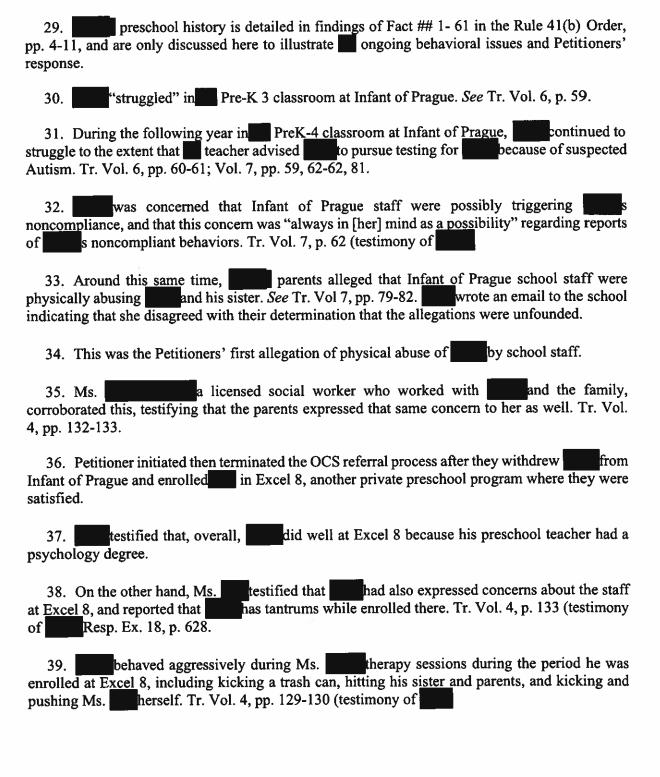
MS, CCC/SLP

- 26. a speech/language pathologist employed by the Respondent as the Related Services Lead, was qualified as an expert in the broad area of speech and language pathology, and the evaluation and assessment of children in the area of speech and language. Resp. Ex. 15; Tr. Vol. 12, p. 105:10-14. is licensed by the State of North Carolina as a speech pathologist and also holds a national certification from the American Speech Language and Hearing Association ("ASHA"). Tr. Vol. 12, pp. 100-101. Ms. has not worked with elementary aged students for eleven years. Tr. Vol. 12, p. 172:22-23. The information that she was limited. See e.g., Tr. Vol. 12, pp. 159:25-160:10 (testifying she did not review s file with the exception of limited speech/language evaluation documents, and did not review the Functional Behavior Assessment and Behavior Intervention Plan before that day), Tr. Vol. 12, p. 160:11-14 (did not meet or observe and did not attend any IEP meetings or evaluation when it was conducted.), Tr. Vol. 14, pp. 160:25-161:8 (did not review Ms. s progress monitoring, ABC checklists, or anecdotal records). Ms. primarily about the appropriateness of the pragmatic language evaluations conducted by Speech The Undersigned found Ms. Pathologist Amy testimony credible and her testimony regarding NCDPI's requirement for pragmatic language evaluations and speech language evaluations in general most helpful.
- 27. Except as otherwise stated herein, overall the Undersigned found the witnesses' testimonies consistent with the educational records. Respondent's witnesses were afforded the applicable deference due their position based on their "demonstrated knowledge and expertise" with respect to the facts and inferences within the specialized knowledge of the witness. N.C. Gen. Stat. § 150B-34(a).

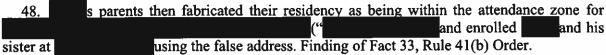
# s Background

28. was five (5) years old kindergarten student at all times relevant to this case. is currently seven (7) years old. Stip. 16.

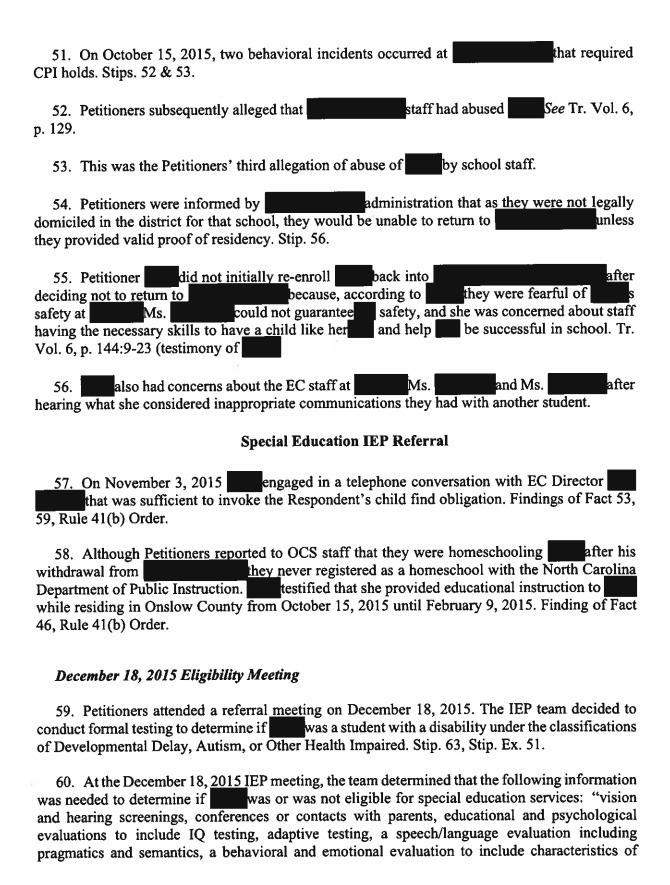
# Preschool History 2012-2014



# 2015-2016 School Year on May 5, 2015 40. Petitioner registered for the 2015-2016 school year. Finding of Fact 10, Rule 41(b) Order. 41. On September 2, staff members implemented CPI holds in response to aggressive behaviors in the bus line and in the school building. Stips. 39-41. 42. Petitioners subsequently alleged that had been choked during a CPI hold. Tr. Vol. 7, pp. 125-126. 43. This was the Petitioners' second allegation of physical abuse of by school staff. spoke with the staff members who implemented the CPI holds with September 2, all of whom reported that had not been choked or struggled to breathe during the September 2 incident. Tr. Vol. 7, pp. 152-153. was the only person to report that he had been choked. Tr. vol. 7, p. 152. stated **45**. does not lie" and refused to believe the staff. Stip. Ex. 21. that her 46. Petitioner complained to school administration about the purported abuse at and were dissatisfied with the administrators' response. Stip. Exs. 21, 22, 27, 44. 47. On October 15, 2015 accused a teacher assistant of laying her full body hovered over top of him, to the extent that weight on while Principal in between the bodies and pull him out." Stip. Ex. 44, p. 203. Like they had at Infant of Prague after the allegation of abuse, sparents subsequently withdrew



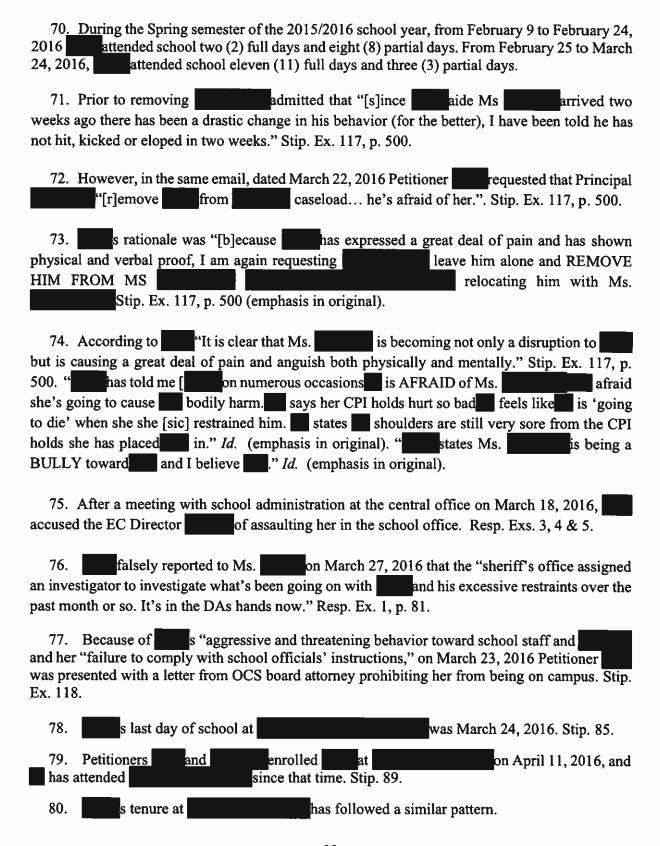
- 49. decided to pursue a 504 plan for trather than an IEP, and she provided school psychologist with written documentation of states a diagnosis of autism. Findings of Fact 35, 37, & 39, Rule 41(b) Order.
- 50. This was the first documentation received by OCS indicating that with ADHD and Autism Spectrum, conditions that could qualify as a student with a disability. Finding of Fact 40, Rule 41(b) Order.

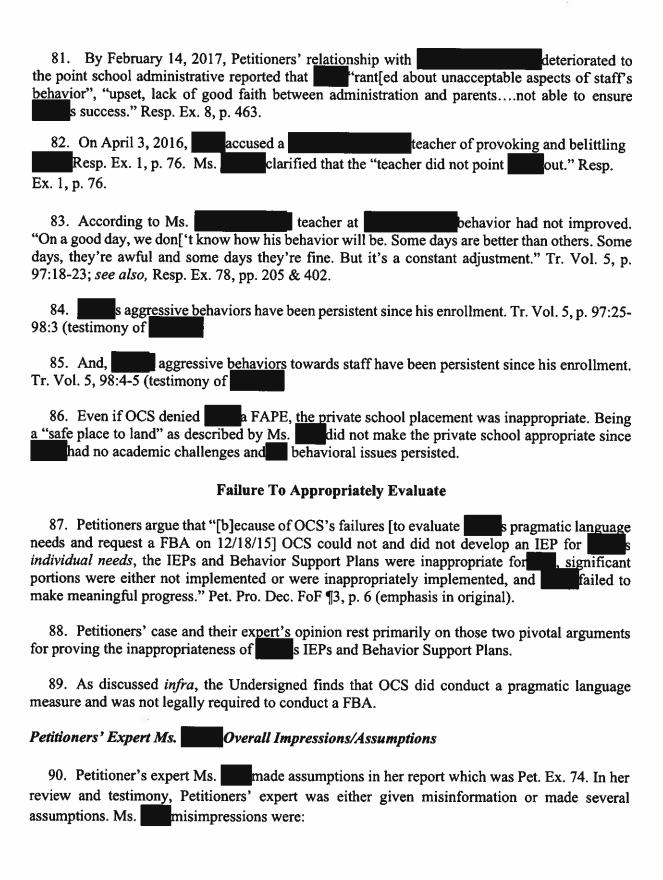


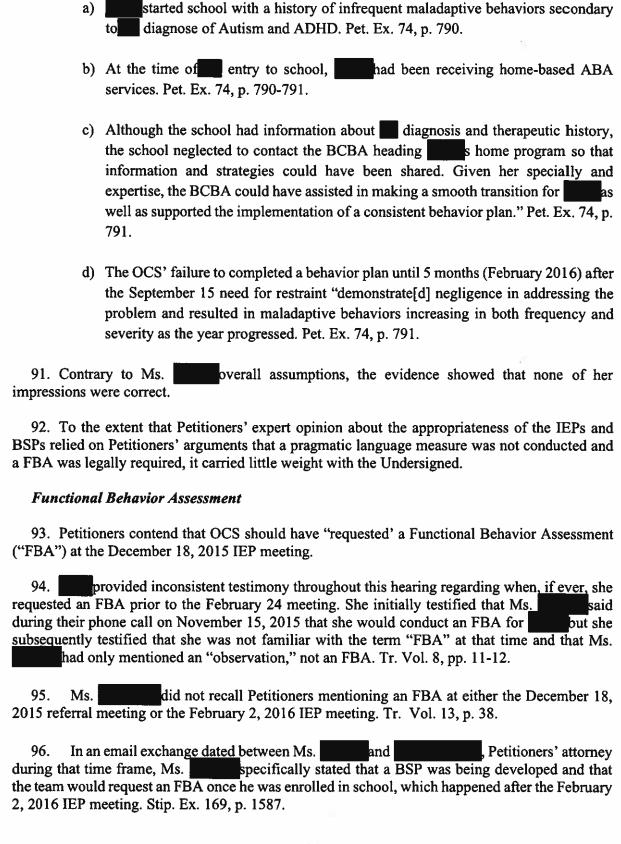
autism, a social developmental history, observation across settings, a health screening required for DD, a motor screening, and two researched based interventions." Stip. 64, Stip. Ex. 50, p. 218. 61. Testing started the same day as the referral meeting and continued through January 25. 2016. Stips. 65-68. Testing included a speech language evaluation, a psycho-educational evaluation, and an occupational therapy evaluation. Stip. Exs. 58, 61 & 62. 62. On February 5, 2016, through their attorney, Petitioners requested that have any contact with their child." Stip. Ex. 169, p. 1668. nor Ms. "neither Ms. was assigned seems EC teacher. Id. OCS complied with this request and ultimately Ms. had not subsequently requested a FBA on behalf of Petitioner, nor did the team agree to conduct a FBA at the December 18, 2015 or February 2, 2016 IEP meeting. Stip. Ex. 50, p. 218. 63. A psycho-educational evaluation was conducted on January 4, 2016, which reported had an average IQ (96 Standard Score "SS"), average school readiness composite (89 SS), average academic application (97 SS), and well above average general developmental profile. Stip. Ex. 61. 64. A speech/language evaluation was conducted on January 14, 2016, and he scored in the average range. Stip. Ex. 61. 65. On February 2, 2016 the IEP team developed an Initial IEP and Behavior Support Plan (the "February 2 IEP"). Stip. Exs. 81 & 65. 66. A subsequent IEP meeting was held on February 24, 2016 (the "February 25 IEP"), OSC convened an IEP meeting at the request of Petitioners and through their attorney, to re-address transportation<sup>5</sup> and get started on an FBA. Stip. 77; Stip. Ex. 167, p. 878. 67. Both the February 2, 2016 IEP and February 25, 2016 IEPs had the same goal, however, the parents' concerns at the February 24, 2016 IEP meeting were as follows: The parents are concerned with the level and escalation of behaviors they haven't seen in other environments. Additionally, parents are concerned that intensive support person who is qualified to address needs without the end result being physical restraint. Stip. Ex. 96, p. 451. parents want 68. The parent's vision on the February 25 IEP was " 'monitored' and in general education but realize that it may take some time to do." Stip. Ex. 96, p. 451. 69. Although Petitioner's private BCBA therapist had developed an ABA therapy plan with behavior and communication goals on January 28, 2016 and had received some ABA therapy, Petitioner did not share this plan with the IEP team on February 24, 2016, nor did they

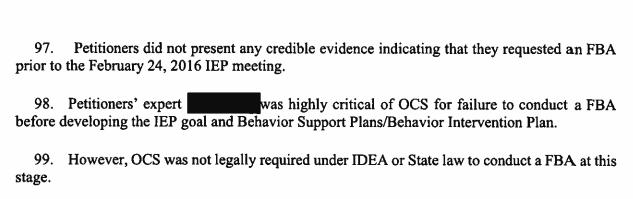
allow the ABA therapist to discuss the ABA home program. Stip. Ex. 96, p. 451.

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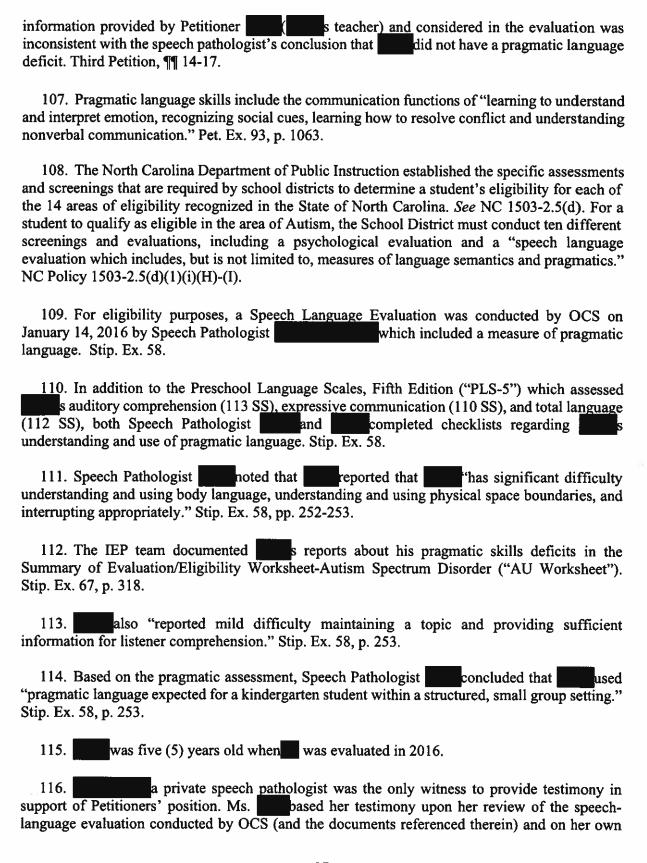
- 100. Ms. acknowledged that although a FBA was not a legal requirement if would have been "best practice" for OCS to have agreed to conduct a FBA at the December 18, 2015 and February 2, 2016 IEP meetings.
- 101. The Undersigned finds that, although it may not have been "best practice", that OCS did not deny a free and appropriate public education and was not legally obligated to conduct a FBA prior the development of the IEP behavioral goal, Behavior Support Plans, and/or Behavior Intervention Plan at the December 18, 2015 Eligibility meeting, the February 2, 2016 IEP meeting, and the February 24, 2016 IEP meeting.

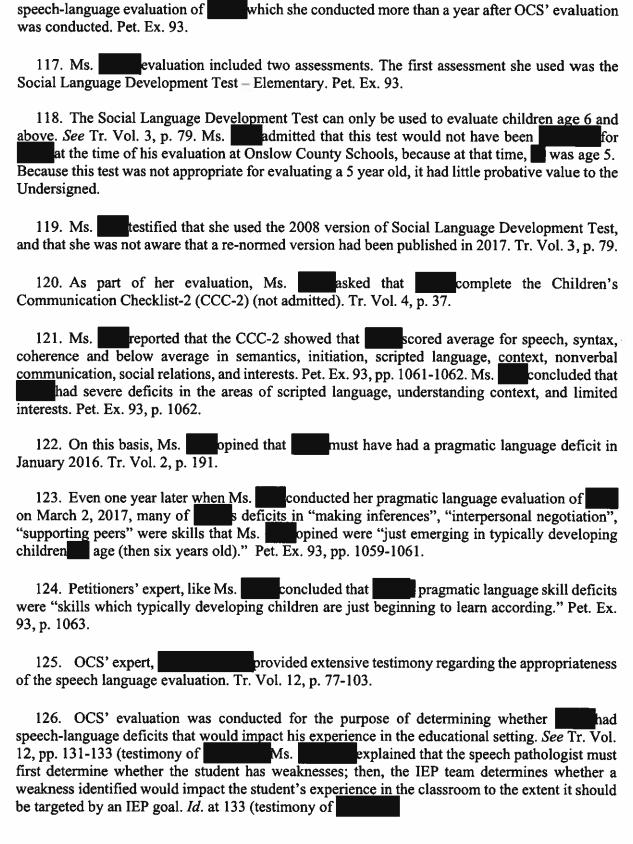
## Speech Language Evaluation

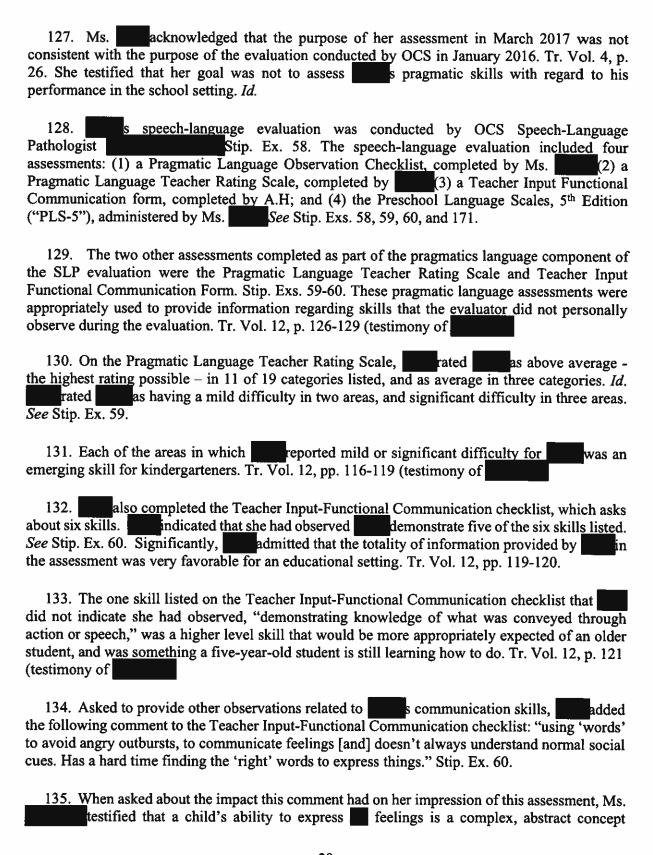
- 102. Of the evaluations conducted, Petitioners contend that they have contested only the speech language evaluation.
- 103. However, when asked at the hearing by the Undersigned: "Is there an allegation in the petition, Ms. of certain evaluations that were not conducted." Tr. Vol. 2, p 168:6-8. Petitioners' counsel conceded that the FBA was the only evaluation Petitioners alleged should have been conducted. Tr. Vol. 2, p. 168: 9-15.
- 104. The *Pro Se* Amended Petition dated July 15, 2016 in the Claim for Relief states: "4. The Onslow County School System failed to fully and appropriately evaluate as they never conducted an OT evaluation, physical therapy evaluation, or a Functional Behavior Assessment." *Pro Se* Amended Petition OAH case file no. 16 EDC 4738, ¶4.
- 105. In the Petition, case file no. 17 EDC 0447, Petitioners complained that "The PLS-5 does not have a pragmatic measure, and the speech/language evaluation did not utilize and other pragmatic assessments." Petition dated January 23, 2017, ¶14. Petitioners concluded that OCS "failed to conduct a pragmatic language assessment that they agreed on December 18, 2015 to conduct." Third Petition ¶14.

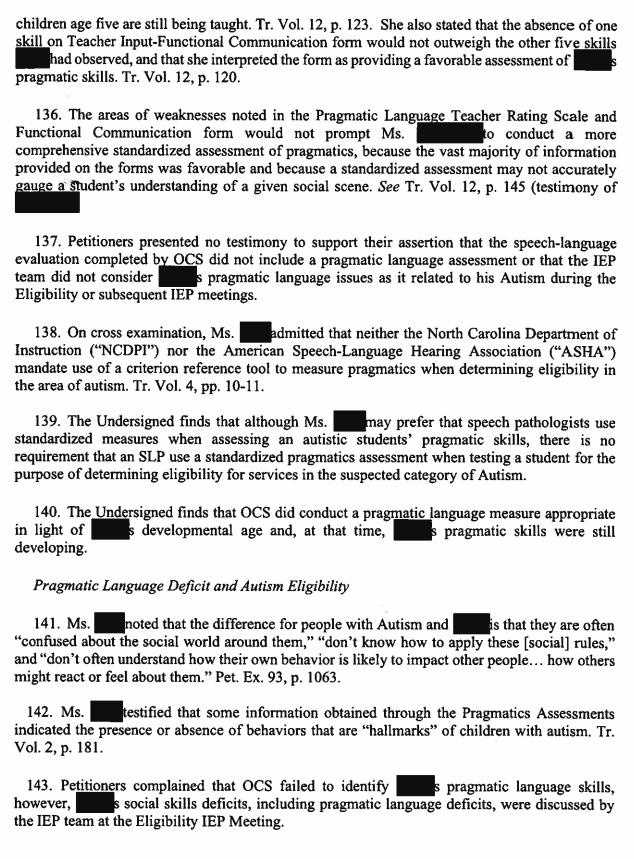
## Pragmatic Language Assessment

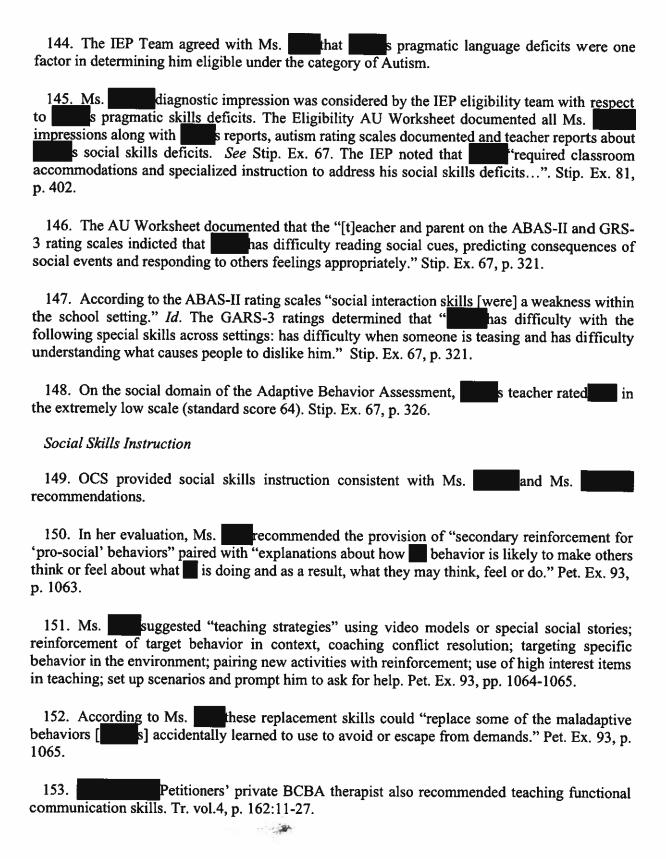
106. In sum, Petitioners alleged that the speech language evaluation was flawed in three ways:
(1) the evaluation did not include a pragmatic language assessment; (2) the conclusion that pragmatic language skills were within functional limits for his age lacked support; and (3) certain

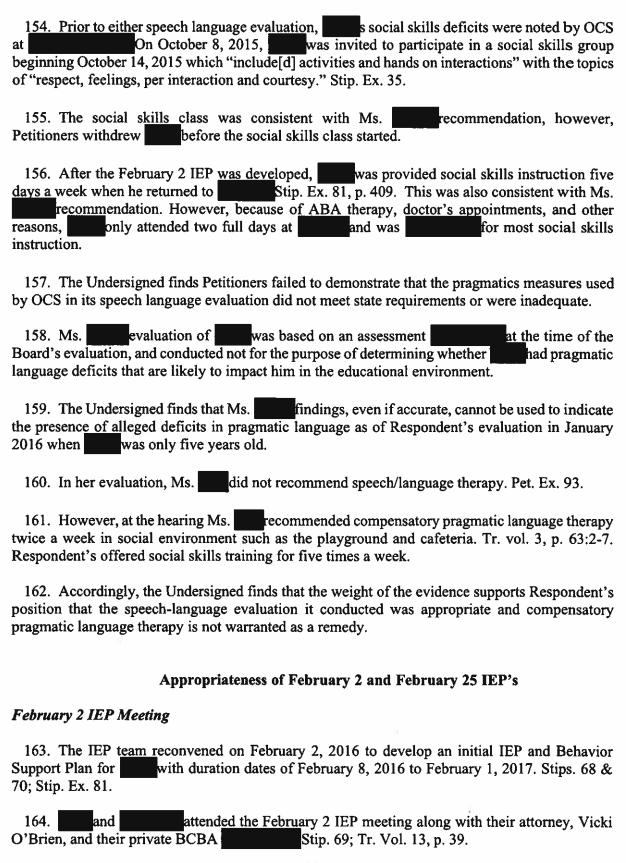


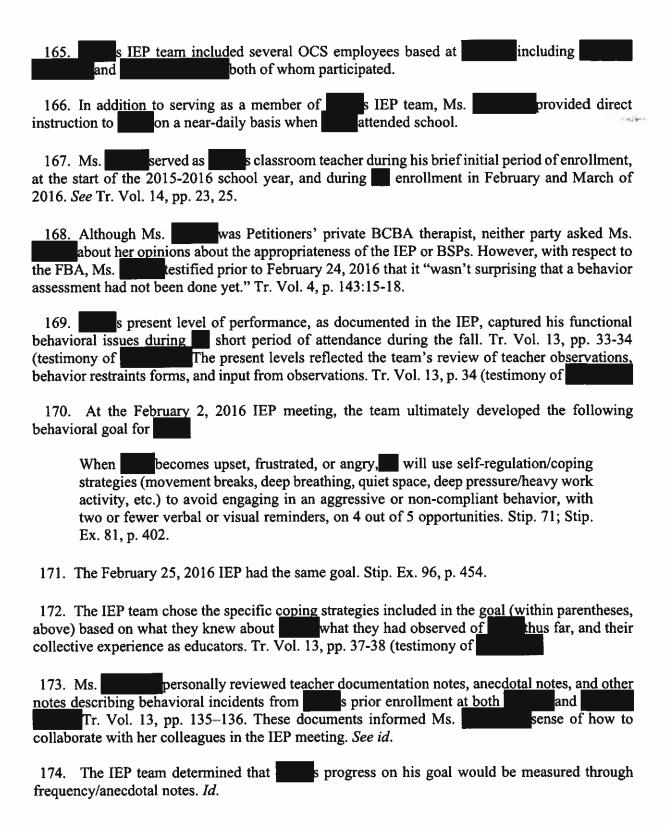


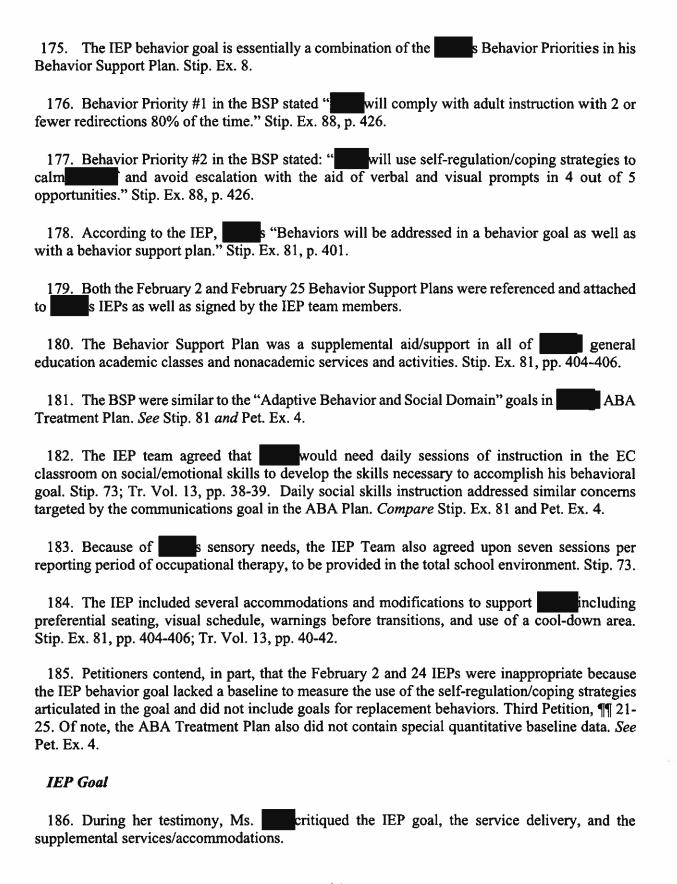


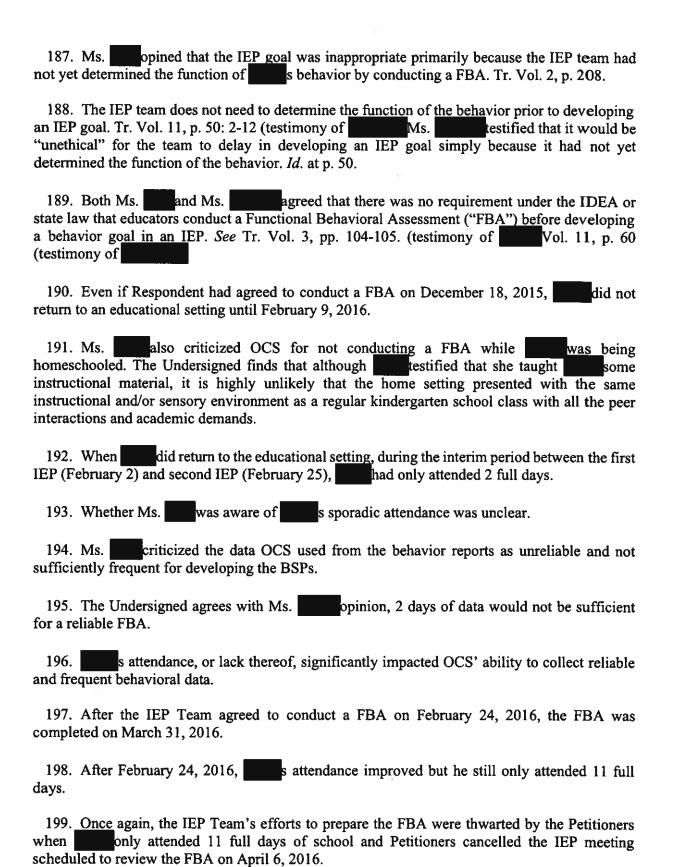








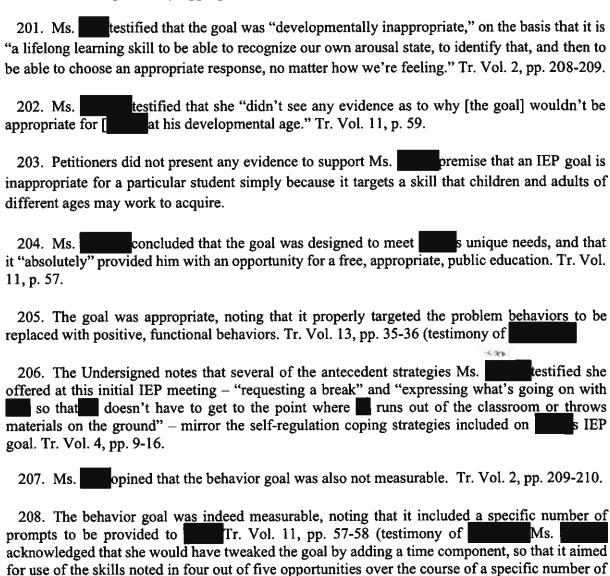




200. The Undersigned finds that the absence of a Functional Behavior Assessment does not render an IEP behavior goal inappropriate and that the Respondent provided a cogent and responsive explanations of their decisions in light of the difficulties faced in developing the IEP.

# Goal Was Developmentally Appropriate and Measurable

Id. at 57 (testimony of



209. Similar prompts and measurements were in the ABA Treatment Plan. Pet. Ex. 4, p. 14 ("2 prompts in 4 out of 5 opportunities"); p. 6 ("2 prompts to participate and follow the rules in 2 out of 7 opportunities").

weeks or trials. Id. at 58. But even without this added element, the goal was measurable as written.

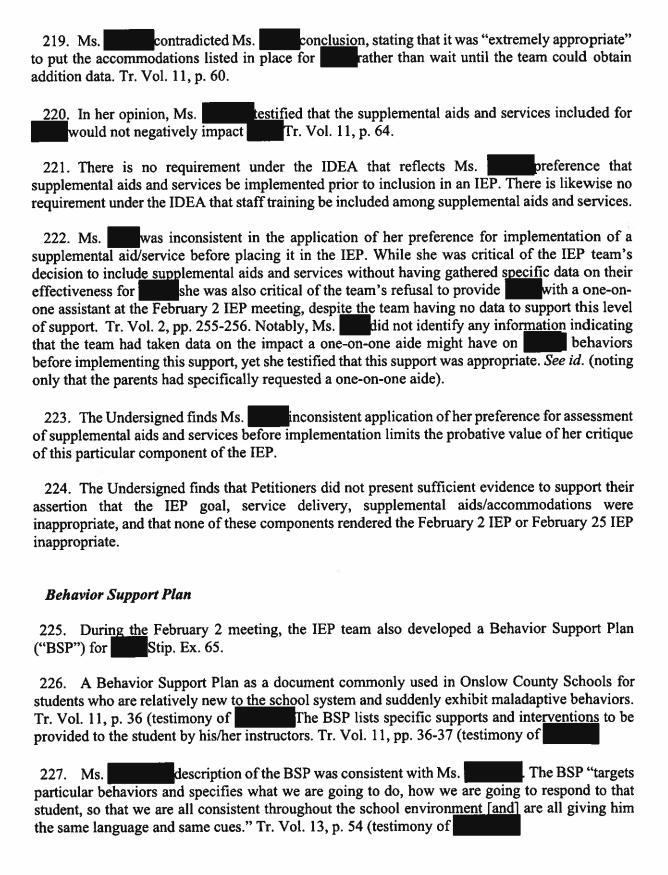
210. Although the Undersigned agrees that a time component would improve the goal, the Undersigned finds that the weight of evidence supports Respondent's position that the IEP goal was measurable and appropriate for

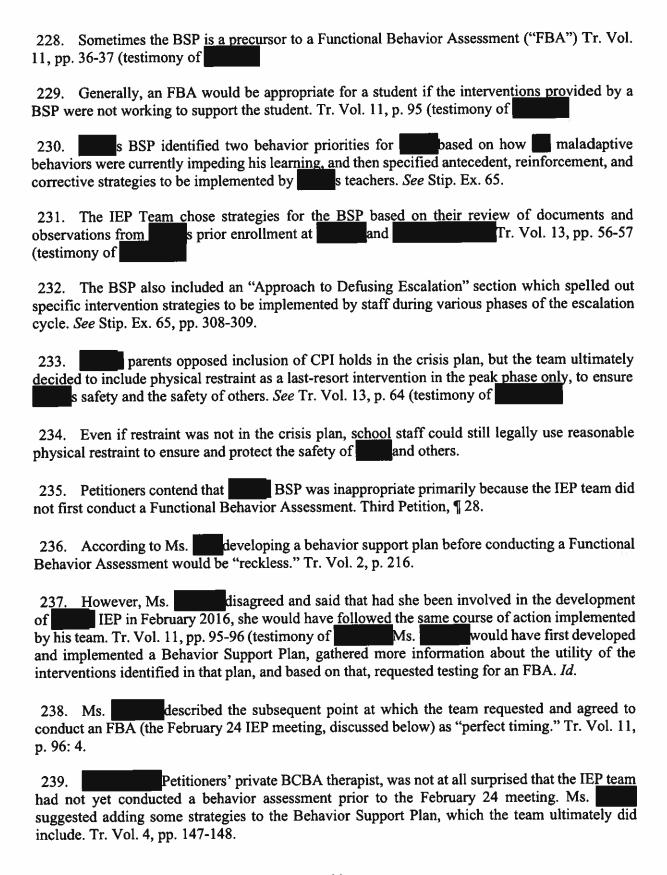
## Service Delivery

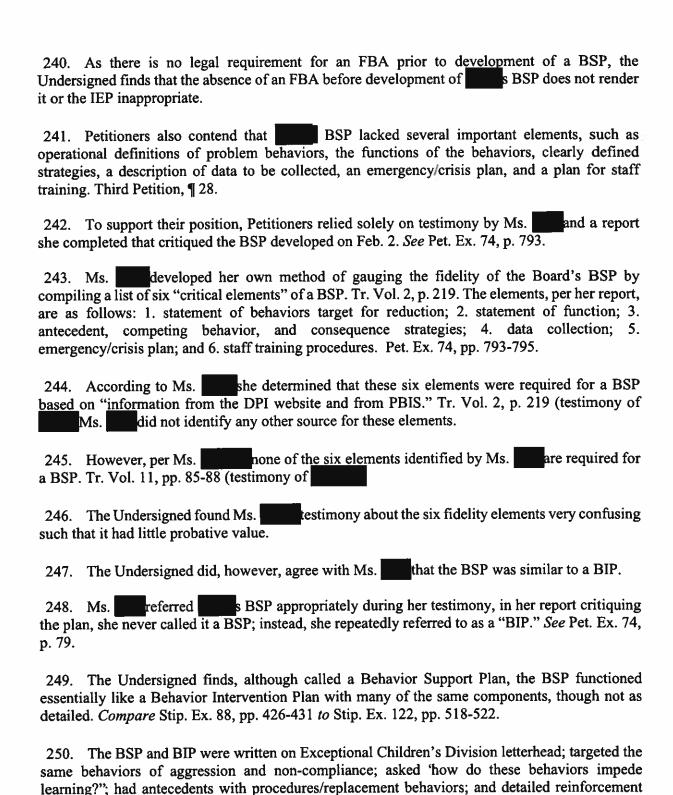
- 211. According to Ms. the service delivery outlined in the IEP was inappropriate because it called for daily 20-minute sessions of social skills instruction but had no social/emotional goal. Tr. Vol. 2, p. 214. Ms. also stated it was inappropriate because while there was a behavior goal, there was no service delivery related to the behavior goal. Ms. provided no opinion as to what she felt would be an appropriate amount of service delivery, and Petitioners offered no other criticism or critique regarding the service delivery outlined in the IEP.
- 212. Furthermore, Ms. explained that when IEP teams complete this portion of the IEP, the computer program used by the District (called "CECAS") provides a drop-down menu to select from. Tr. Vol. 11, p. 62. She indicated that the drop-down menu does not allow the team to identify "behavior" instruction, but that the drop-down menu does include a label for "social emotional" instruction. Tr. Vol. 11, p. 62.
- 213. According to Ms. testimony regarding CECAS, the label given to the 20-minutes sessions agreed upon by the team was a function of the categories listed in the program, and Ms. indicated that seems behavior goal would be considered a social emotional goal. Tr. Vol. 11, p. 62.
- 214. Ms. provided with his daily social skills instruction, and that during that time, she worked on his behavior goal.
- 215. The Undersigned finds that Petitioners have failed to demonstrate that the service delivery reflected in the IEP was intended to serve some purpose other than instruction on his behavior goal. To the extent Petitioners contend that the service delivery in the IEP was flawed, Undersigned finds that the weight of the evidence supports the service delivery in the IEP as being appropriate for

### Supplemental Aids and Services

- 216. Petitioners contend that the supplemental aids and services provided in the IEP were inappropriate because they were "general strategies" that were not specific to the and that the team could not predict at that time what impact the strategies might have on 212 (testimony of 212 (testimony of 212).
- 217. According to Ms. if the impact of a strategy were unknown, it could not be implemented in an IEP. See id.
- 218. Ms. also suggested that the supplemental aids and services provided were inadequate because they did not include a requirement for staff training. Tr. Vol. 2, p. 213.

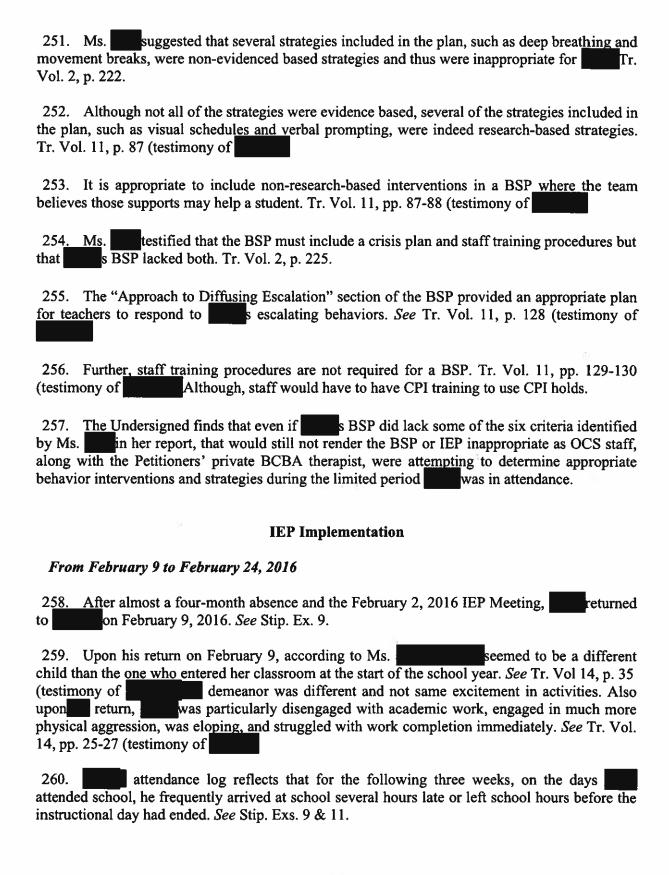


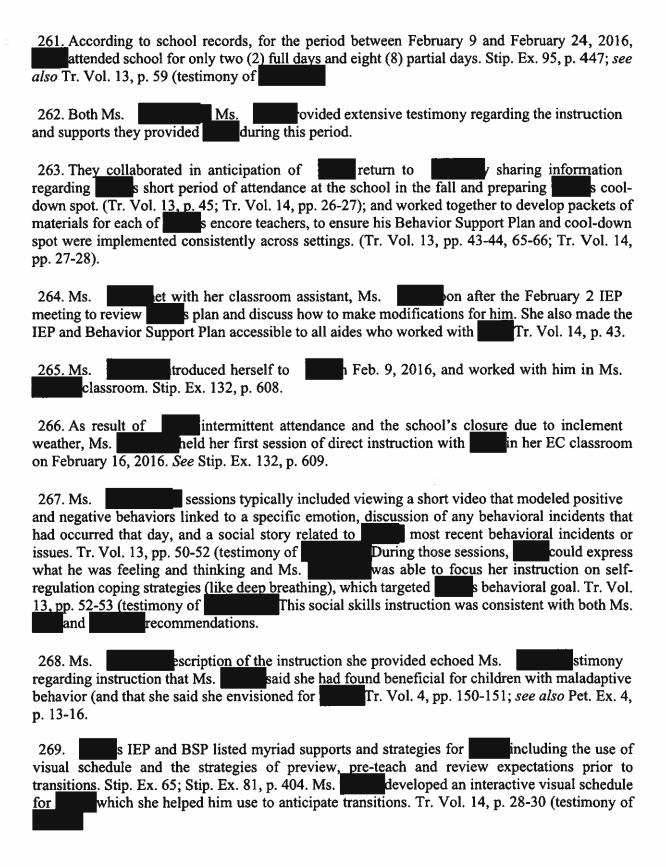


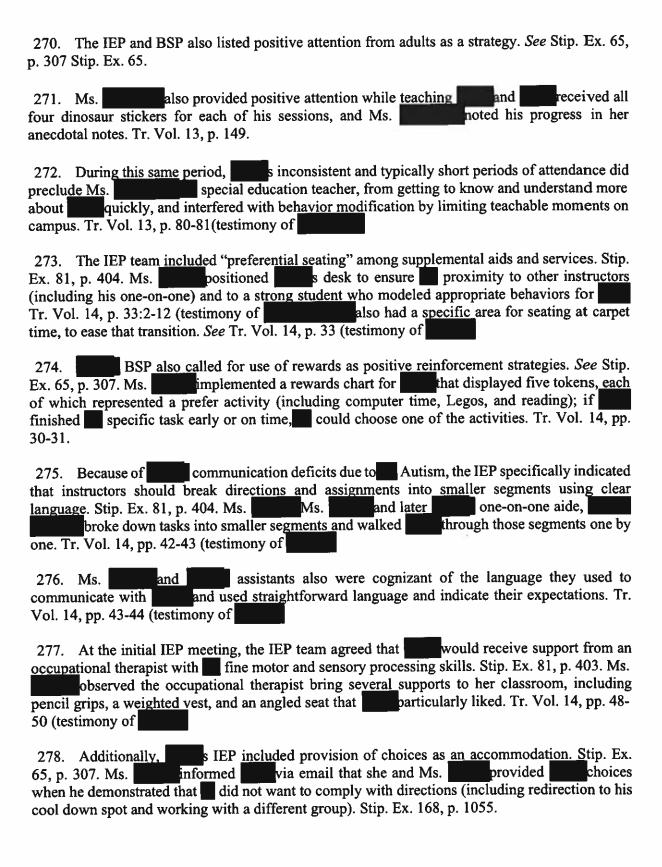


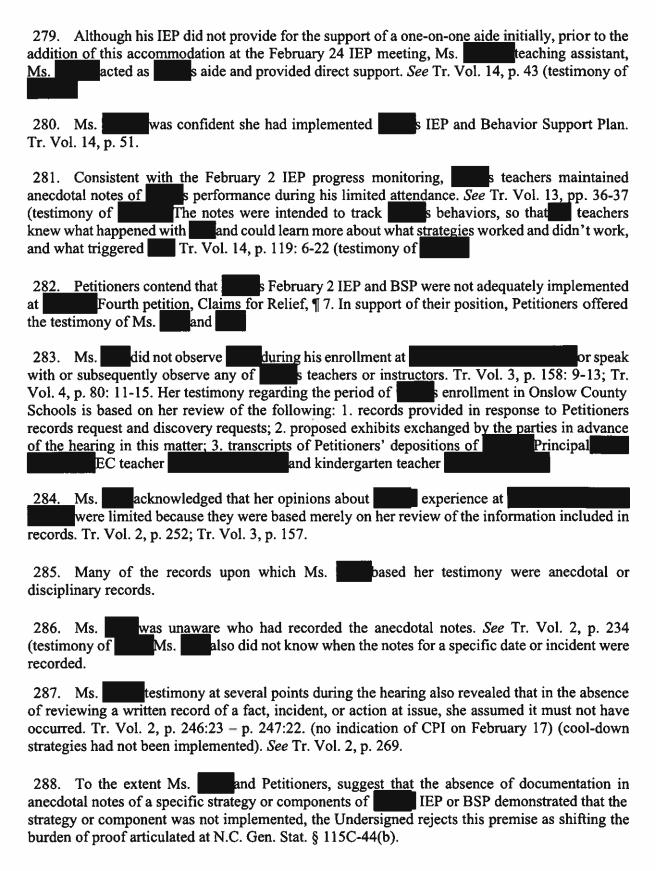
strategies, corrective strategies, approach to defuse escalation, phases and behavior of the

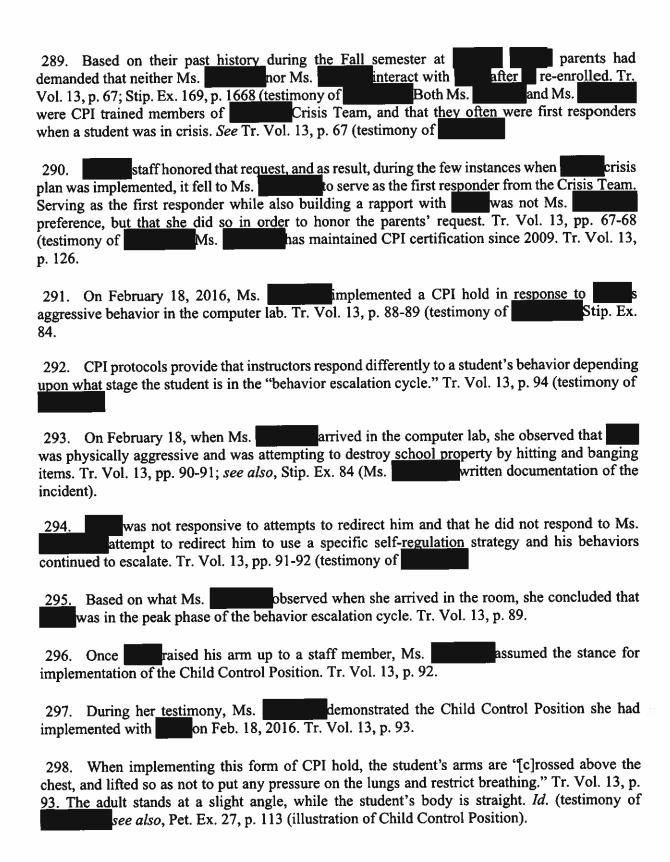
escalation cycle, roles/responsibilities sections. Compare Stip. Ex. 88 to Stip. Ex. 122.

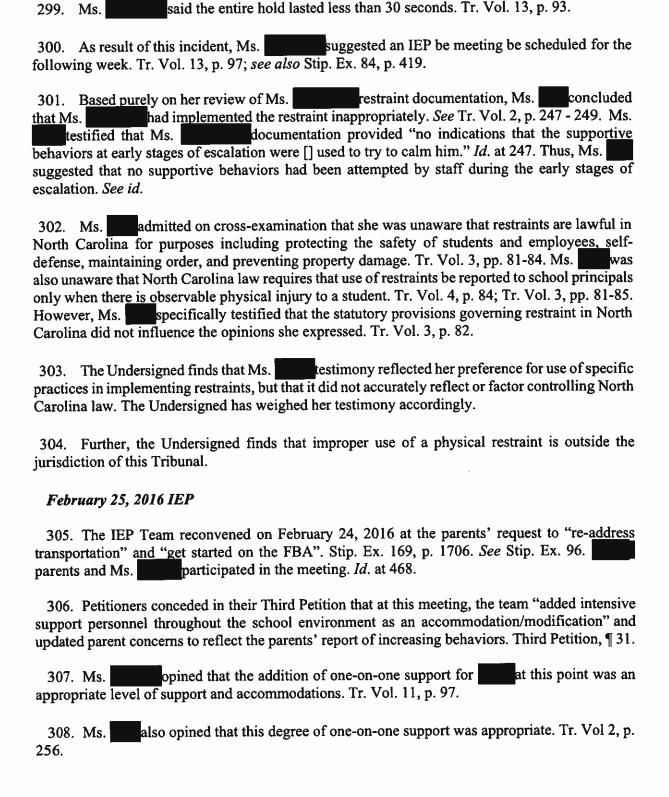


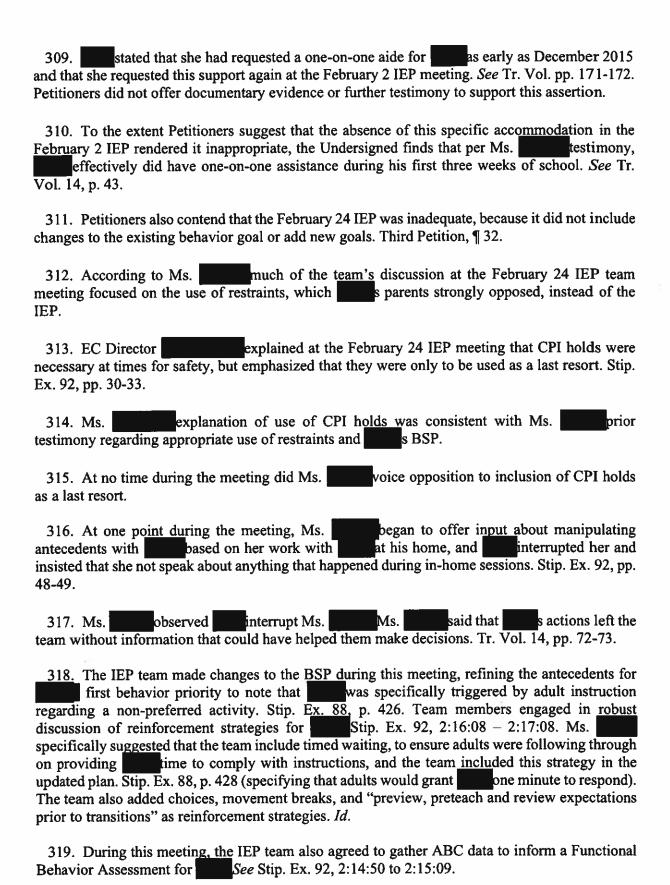


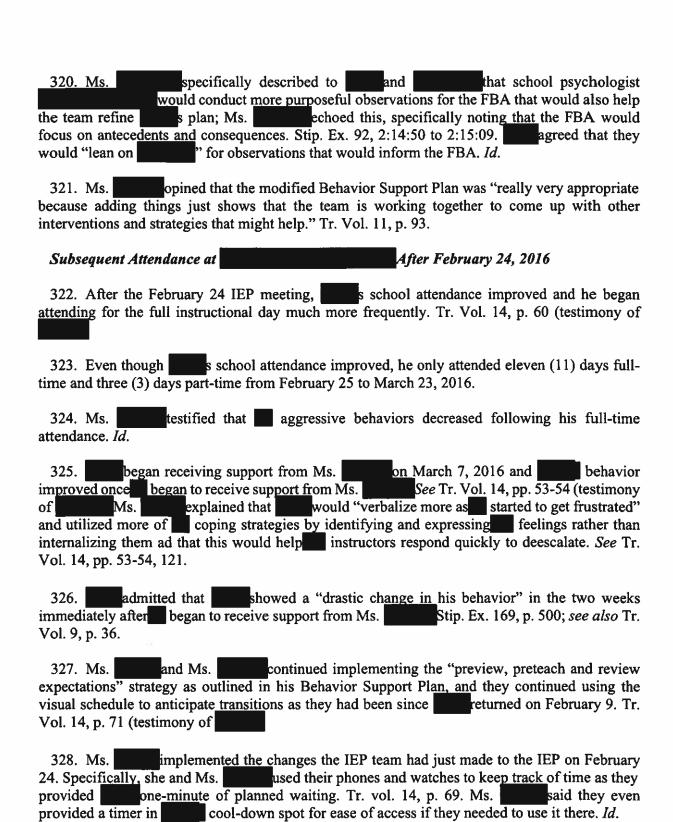




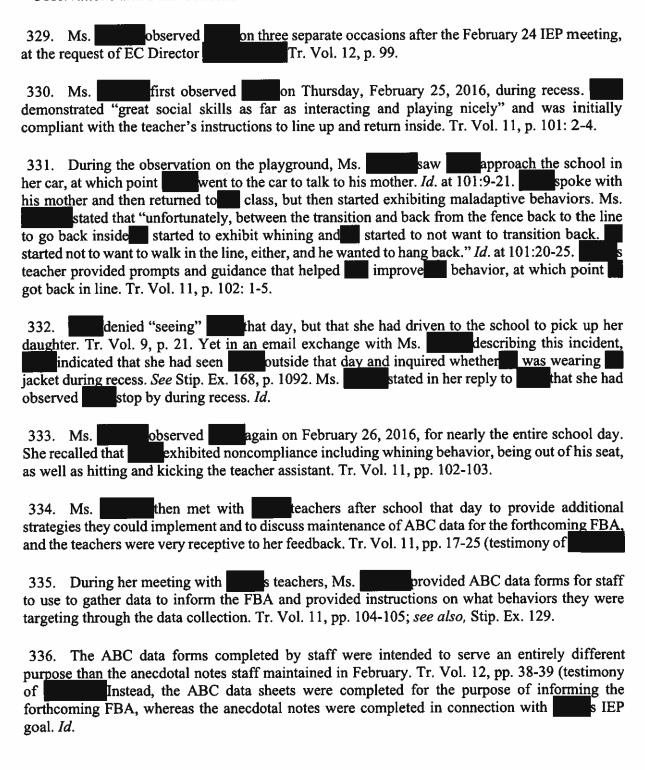




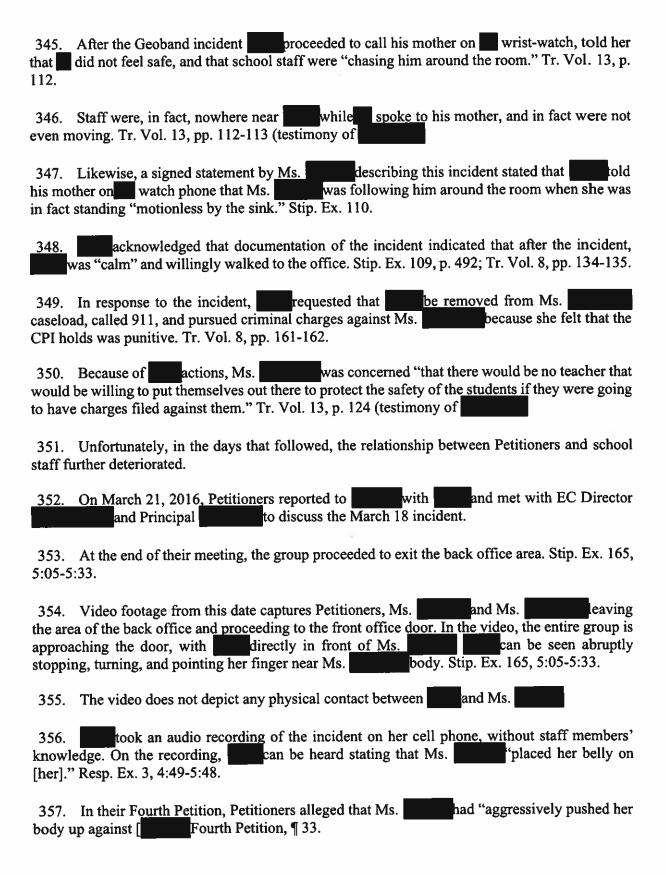


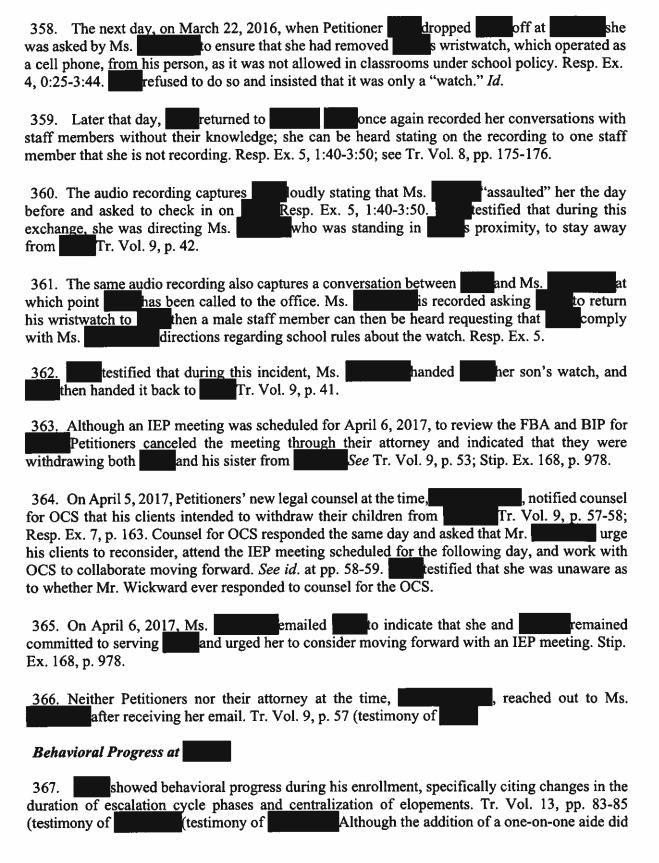


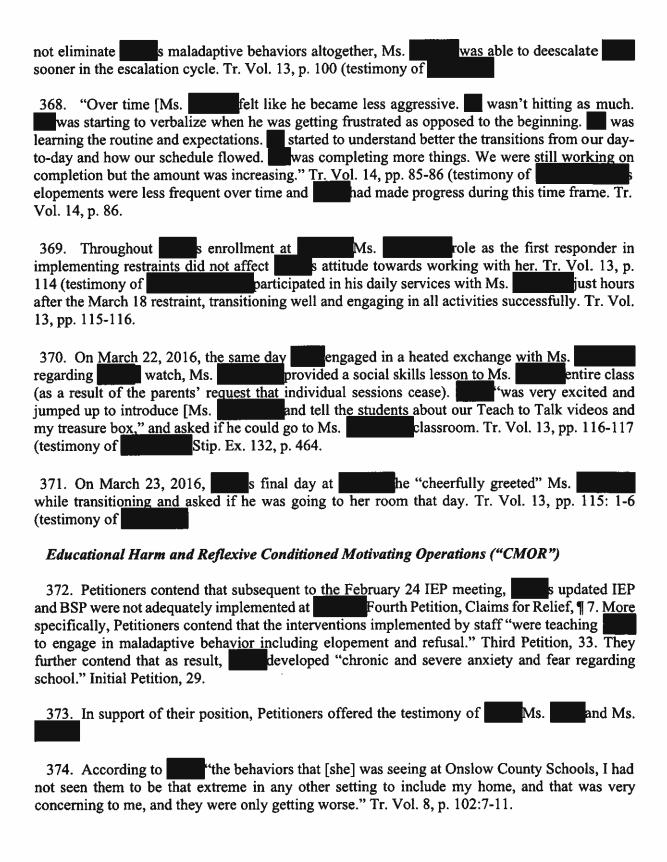
#### Observations and Data Collection

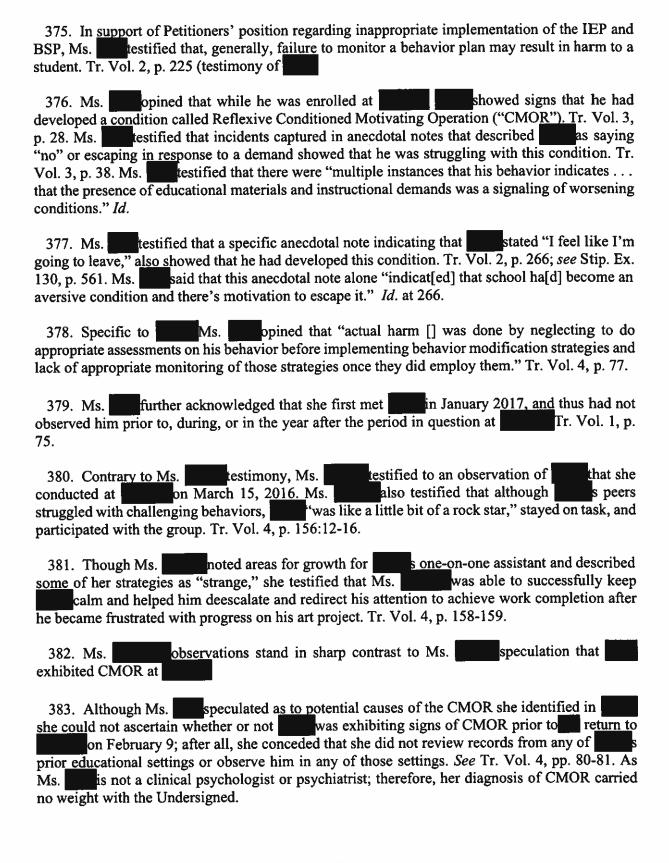


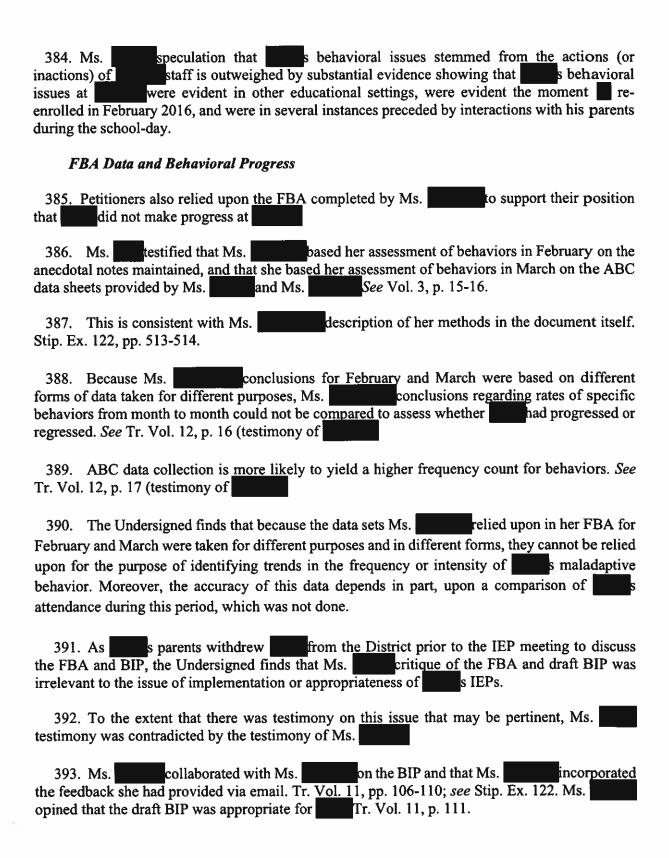
337. In the following weeks of senrollment, Ms. and Ms. filled out the ABC data collection forms and provided them to the school psychologist responsible for completing the FBA and BIP. Tr. Vol. 14, pp. 84-85 (testimony of third and final observation of was on March 23, 2016. During this 338. Ms. interacted positively with his one-on-one aide, Ms. and that they observation, demonstrated a strong relationship. Tr. Vol. 11, p. 106 (testimony of 339. During his observation on March 23, 2016, began to exhibit maladaptive behavior when he became frustrated that his wrist-watch, which also operated as a phone, made it difficult for to put on coat. Tr. Vol. 11, pp. 106 – 107 (testimony of call both his mother and father on the watch and express his frustration about the watch; father answered the call and spoke with for some time. Id. After this incident, she testified, proceeded to go about his day and transitioned to the library. Id. at p. 107. 340. After this third observation and in anticipation of Ms. forthcoming FBA and provided a list of eight strategies specific to that she suggested be included BIP, Ms. in the BIP. See Tr. Vol. 11, p. 140-142; Stip. Ex. 169, p.1267-1269. 341. Ms. had observed Ms. and Ms. successfully using the majority of the strategies she listed. Tr. Vol. 11, pp. 140-142. CPI Holds After February 25, 2016 342. Due to the success of the IEP and BSP, Ms. implemented CPI holds on only two separate occasions in March 2016. 343. On March 7, 2016, Ms. came upon when was in the "peak" phase of the to the point where Ms. escalation cycle, as was repeatedly kicking Ms. crying. Tr. Vol. 13, p. 106. In response, Ms. implemented the Child Control Position for less than a minute. Tr. Vol. 13, pp. 105-106; Stip. Ex. 100. demonstrated some further physical aggression as he de-escalated, and Ms. implemented blocking and redirected to use a calm-down strategy. Tr. Vol. 13, p. 107. then proceeded to integrate into encore class with peers and participate successfully. Tr. Vol. 13, p. 107. 344. On March 18, 2016, Ms. entered Ms. classroom to retrieve for his daily social skills instruction and observed yelling, shouting, and shoving Ms. tried to redirect Vol. 13, p. 109. Ms. s behavior to her session, as this strategy had helped shift his focus and deescalate in the past. Tr. Vol. 13, pp. 109-110. responded by aiming a large rubber band ("Geoband") about an inch away from Ms. face. Ms. assumed the Child Control Position and implemented a CPI hold for 15-20 seconds. Tr. Vol. 13, pp. 110-111. After Ms. released he once again aimed the Geoband at Ms. and she restrained him a second time for 15-20 seconds. Stip. Ex. 107, p. 247; Tr. Vol. 13, pp. 111-112.



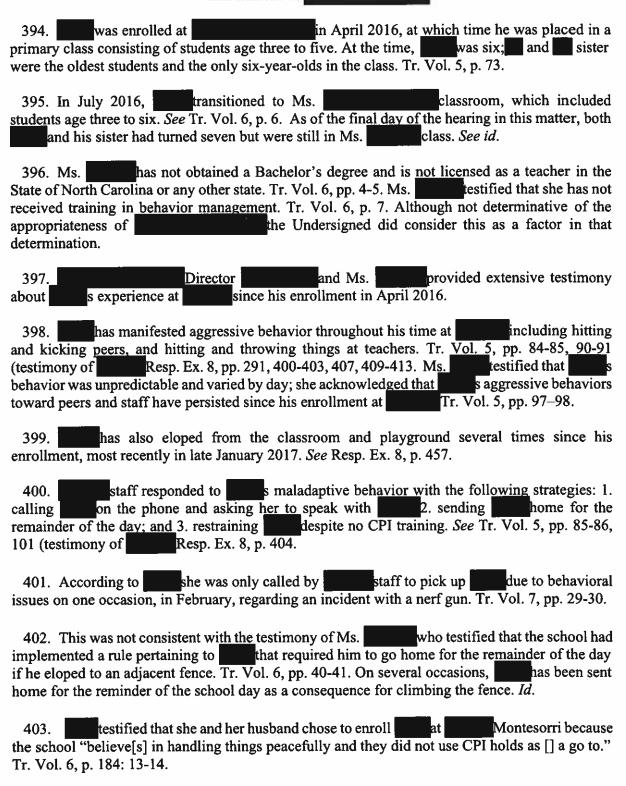


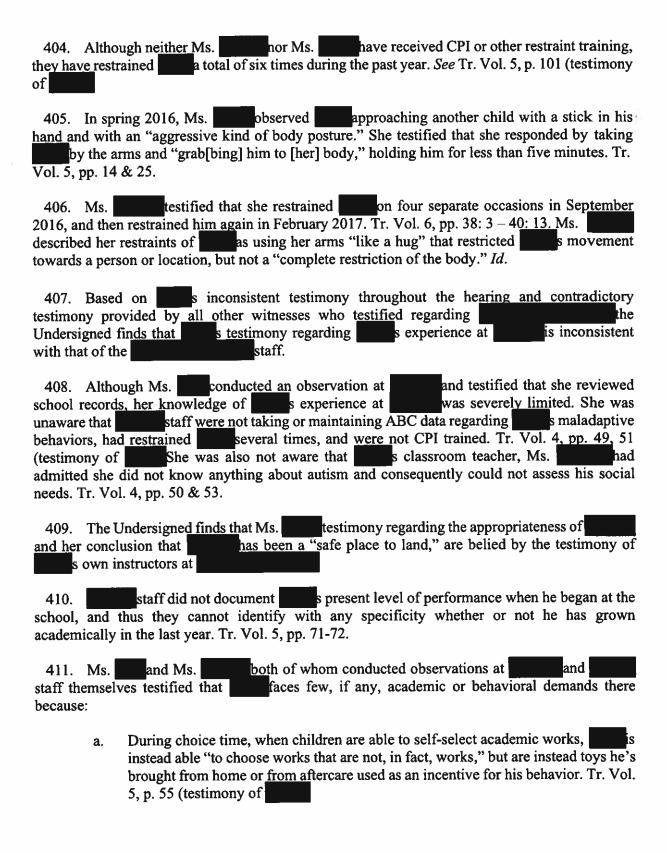


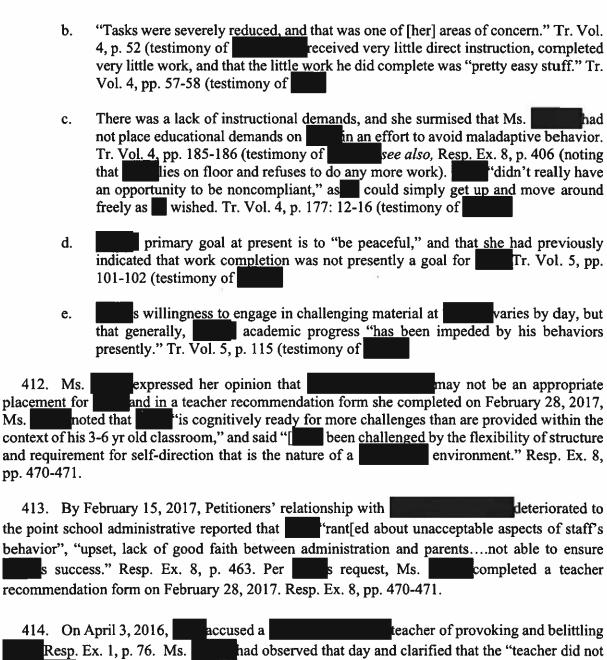




#### Enrollment at







414. On April 3, 2016, accused a Resp. Ex. 1, p. 76. Ms. had observed that day and clarified that the "teacher did not point out." Resp. Ex. 1, p. 76.

stated in her email that "they had plans to visit other schools..." which indicated that Petitioners admitted was an inappropriate private placement. *Id*.

#### CONCLUSIONS OF LAW

Based on the above Findings of Fact and relevant laws and legal precedent, the Undersigned concludes as follows:

### General Legal Framework

- 1. To the extent the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.
- 2. This Order incorporates and reaffirms the Conclusions of Law contained in the previous Orders entered in this litigation.
- 3. The Petitioners and Respondent named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them. Stip. 1.
- 4. The Petitioners and Respondent named in this action are correctly designated and have been properly noticed of this hearing. Stip. 2.
- 5. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Parts 300 and 301. The IDEA and implementing regulations and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed. Stip. 6.
- 6. As the party requesting the hearing, the burden of proof lies with Petitioners and the standard of proof is by a preponderance of the evidence. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005). Stips. 4. & 5. Actions of local boards of education are presumed to be correct; for Petitioners to their evidence must outweigh the evidence in favor of the Board's decisions. See N.C.G.S. 115C-44(b).
- 7. The IDEA is the federal statute governing the education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301. Stip. 7.
- 8. The controlling state law for students with disabilities in N.C. Gen. Stat. §§ 115C, Article 9 and the corresponding state regulations. Stip. 9.
- 9. The IDEA was enacted to "ensure that all children with disabilities have to them a Free Appropriate Public Education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A).
- 10. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 et seq. and is the local education agency responsible for providing educational services in Onslow County, North Carolina. Stip. 8. Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300 et seq.; and N.C. Gen. Stat. 115C-106 et seq. Respondent is also subject to the Policies Governing Services for Children with Disabilities developed by the State Education Agency. These acts and regulations and policies require the Respondent to provide FAPE for those children in need of special education residing within its jurisdiction. See Stips. 6, 7, & 9.

- 11. At all times relevant to this matter, Petitioners resided in Onslow County, North Carolina. See Stip. 13.
- 12. A school district must offer every student with a disability the opportunity for a free appropriate public education ("FAPE") through an Individualized Education Plan ("IEP") that meets the requirements of the IDEA and state standards. 20 U.S.C. 1412(a)(1)(A). 20 USC 1401(9).

### **IEP Appropriateness**

- 13. "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).
- 14. For a reviewing court, "the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Endrew F.*, 137 S.C. at 999. Thus, school districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Bd. of Ed. of Hendrick Hudson Central School Dist.*, Weschester Cty. v. Rowley, 458 U.S.176, 189-90 (1982).
- 15. An appropriate IEP must do the following: 1. indicate the student's current level of academic achievement and functional performance; 2. describe how the child's disability affects his involvement and progress in the general education curriculum; 3. state annual goals; 4. provide a method for progress monitoring; and 5. identify special education and related services for the student. Endrew F., 137 S.Ct. at 994 (citing 20 U.S.C. § 1414(d)(1)(A)); M.M. ex rel. D.M. v. Sch. District of Greenville Cntv., 303 F.3d 523, 527 (4th Cir. 2002).
- 16. Neither the IDEA nor state regulations require that an FBA be conducted prior to development of any portion of an IEP. In fact, an FBA is required in only one circumstance: where an IEP team has determined that a child's misconduct was a manifestation of his/her disability. See 34 C.F.R. 300.530(f).
- 17. The IDEA simply requires an IEP team to consider a student's need for positive behavioral interventions and supports where a student's behavior impedes his learning of that of others. 34 CFR 300.324(a)(2)(i). Thus, as long as the team considers behavioral strategies, the absence of an FBA does not render an IEP inappropriate. See A.C. ex rel. M.C. v. Board of Educ. of the Chappaqua Central School Dist., 552 F.3d 165, 172 (2d Cir. 2009) (holding that the absence of an FBA, even where required by state regulations, did not render the IEP procedurally or substantively inadequate, because the IEP provided several strategies to address the student's behavior); W.S. Nyack Union Free School Dist., No. 09 Civ. 10139 (DAB), 2011 WL 1332188, \*10 (S.D.N.Y. Mar. 30, 2011) (holding that the IEP's inclusion of positive reinforcement and verbal prompts as supplemental aids and services, couples with the decision of the IEP team to conduct an FBA in coming school year, rendered the IEP appropriate even though the FBA had not yet been conducted).

- 18. While not dispositive, evidence of actual progress (or the lack thereof) is relevant to a determination of whether a challenged IEP was reasonably calculated to confer some educational benefit." M.S. ex rel. Simchick, 553 F.3d 315, 326-27 (4th Cir. 2009).
- 19. Once a school has formulated a procedurally proper IEP, a reviewing court should be reluctant to second-guess the judgment of educational professionals, and neither parents nor courts have a right to compel a school district to employ a specific methodology in educating a student. See Rowley, 458 U.S. at 206-08.
- 20. So long as an IEP offers a "basic floor of opportunity that access to special education and related services provides," courts should defer to educators' determination of IEP appropriateness. *Tice v. Botecourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (quoting *Rowley*, 458 U.S. at 201).

# Professional Judgment and Deference to Educators

- 21. The professional judgment of teachers and other school staff is a critical factor in evaluating an IEP. "Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." Hartmann, 118 F.3d at 1001. See also Rowley, 458 U.S. at 207 (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States"). The "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents." Lawson, 354 F.3d at 328.
- 22. In addition, "a reviewing court should be reluctant indeed to second-guess the judgment of education professionals... we must defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides." *Tice* v. Botetourt County Sch. Bd., 908 F.2d 1200, 2017 (4th Cir. 1990) (citations and quotation marks omitted).
- 23. The Undersigned must give deference to school board employees based on their "demonstrated knowledge and expertise of the agency with respect to the facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a).
- 24. The Undersigned acknowledges that she may not substitute her "own notions of sound educational policy for those of the school authorities" whose decisions are under scrutiny. Rowley, 458 U. S., at 206. Where those educational decisions were <u>sound</u> and the educators "offered a cogent and responsive explanation" for their decisions, Endrew F., 137 S. Ct. at 1002, the Undersigned afforded them deference. The Undersigned found that the educators offered a cogent and responsive explanation for their decisions regarding the provision of FAPE to

### **CPI Holds and Physical Restraints**

- 25. In accordance with N.C.G.S. § 115-391.1(c)(1)-(c)(3), "Physical restraint of students by school personnel shall be considered a reasonable use of force ...(a) as reasonably needed to obtain possession of a weapon or other dangerous objects on a person or within the control of a person, (b) as reasonably needed to maintain order or prevent or break up a fight, (c) as reasonably needed for self-defense, (d)as reasonably needed to ensure the safety of any student, school employee, volunteer, or other person present, to teach a skill, to calm or comfort a student, or to prevent self-injurious behavior, (e) as reasonably needed to escort a student safely from one area to another, (f) if used as provided for in a student's IEP or Section 504 plan or behavior intervention plan, [or] (g) as reasonably needed to prevent imminent destruction to school or another person's property. [Otherwise] physical restraint of students shall not be considered a reasonable use of force, and its use is prohibited. Physical restraint shall not be considered a reasonable use of force when used solely as a disciplinary consequence."
- 26. Although Petitioners disagreed with the IEP Team's decisions to include CPI holds in the BSP, the restraints used in this case were pursuant to IEP and attached BSP.

## **IEP Implementation**

- 27. "A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Houston Ind. School Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).
- 28. "[T]he failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education," but "the failure to implement a material or significant portion of the IEP can." Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH, 642 F.3d 478, 484 (4th Cir. 2011) (the district's provision of only seven of the 15 hours of ABA therapy required by the IEP, and evidence that neither the lead teacher nor the aides understood the teaching methods called for in the IEP constituted a material failure to implement); see Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007) (school's provision of five hours of math instruction rather than 8-10 hours called for in the IEP constituted a material implementation failure, but the absence of social stories in one class and the misuse of those stories in another class did not constitute failure to implement the student's behavior management plan); Johnson v. District of Columbia, 962 F. Supp. 2d 263, 268 (D.D.C. 2013) (Courts applying the significant-provision standard articulated in Sumter "have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.") (quoting Wilson v. Dist. of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

### **Appropriateness of Private School Placement**

- 29. Petitioners are entitled to reimbursement for their private program only if they can show both that the public school system's program denied a FAPE and that the private program they chose was appropriate. School Co. of the Town of Burlington, Mass. v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S. 359, 370 (1985).
- 30. Although a private school's program is not scrutinized under the statutory requirements of FAPE, parents seeking reimbursement still must show that the private program provided an education otherwise proper under the IDEA. Florence Cty. Sch. Dist. Four v. Carter by and through Carter, 510 U.S. 7, 12-13 (1993). A private program is proper under the IDEA where it is "reasonably calculated to enable the child to receive educational benefits." M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd., 553 F. 3d 315, 324 (4th Cir. 2009).\
- 31. Several factors bear on a court's determination as to appropriateness of a private placement under the IDEA, including: whether the private program provides the special education services needed by the student, and whether the student progressed behaviorally and/or educationally in the private program. Berger v. Medina City Sch. Dist., 348 F.3d 512, 523 (6th Cir. 2003) (private placement where student enjoyed smaller class size and higher grades deemed inappropriate because none of the special education services needed were provided); Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH, 642 F.3d 478, 488 (4th Cir. 2011) (private placement deemed appropriate under IDEA where autistic student progressed educationally and behaviorally, was learning more, and was no longer engaging in problematic self-stimulating behaviors that occurred in public school).

### **Appropriateness of Compensatory Services**

- 32. As with reimbursement for the costs of private school, a parent-plaintiff seeking compensatory services must first establish that his child was denied a FAPE. See G. ex rel R.G. v. Fort Bragg Dependent Schools, at 309; see also C.G. ex rel. A.S. v. Five Town Comm. Sch. Dist., 513 F.3d 279, 290 (1st Cir. 2008) ("compensatory education is not an automatic entitlement; rather it is a discretionary remedy for nonfeasance or misfeasance in connection with the school system's obligations under the IDEA.").
- 33. If the parent succeeds in showing that his child has been denied a FAPE, then compensatory services may be appropriate. *Id.* "[C]ompensatory education involves discretionary, prospective relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure of a given period of time to provide a FAPE to a student." *G. ex rel R.G.*, 343 F.3d at 309.
- 34. The same standards governing a district's provision of FAPE govern as to the appropriateness of compensatory services. See, e.g., Kelsey v. District of Columbia, 85 F. Supp. 3d 327, 336 (D.C. Mar. 30, 2015) (affirming state hearing officer's discounting of expert opinion of plaintiff's expert, who suggested compensatory relief designed to maximize the student's

educational outcome, as opposed to the standard under the IDEA that would enable the child to receive educational benefits).

### Limitation on Reimbursement and/or Compensatory Education

- 35. Even if Respondent failed to provide a FAPE, the Undersigned may reduce or deny reimbursement "upon a judicial finding of unreasonableness with respect to the actions taken by the parents." 34 C.F.R. § 300.148(d)(3).
- 36. "[O]nce a court holds that the public placement violated IDEA, it is authorized to 'grant such relief as the court determines is appropriate.' "Florence Cty Sch. Dist. 4 v. Carter, 510 U.S. 7, at 15–16, 114 S.Ct. 361, at 366 (quoting 20 U.S.C. § 1415(e)(2)). 'Under this provision, 'equitable considerations are relevant in fashioning relief,' and the court enjoys 'broad discretion' in so doing." Id. at 16, 114 S.Ct. 361 (quoting Town of Burlington v. Dep't of Educ., 471 U.S. 359, 369, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). "Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." Id. A court may reduce or deny reimbursement upon a finding of "unreasonableness with respect to actions taken by the parents." 20 U.S.C. § 1412(a)(10)(C)(iii)
- 37. A parent's interference with services that were or could have been provided by the district should factor into a court's determination of appropriate compensatory services. See Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31 F. 3d 1489, 1497 (9th Cir. 1994) (holding that "[t]he behavior of Student W's parents is also relevant in fashioning equitable relief," and affirming district court's decision to limit compensatory services due to parents' failure to request services when student re-enrolled in District and their decision to decline offers of summer school instruction).
- 38. The Undersigned finds and concludes that the actions taken by unreasonable such that they thwarted the collaborative process required of all parties in the IDEA.

#### ISSUES FOR DECISION

ISSUE 1: Whether the February 2 and February 25, 2016 IEPs were appropriate for and if not, whether any such failure led to a denial of FAPE for Issue").

## Speech-language Evaluation

39. The North Carolina Department of Public Instruction ("NCDPI") established the specific assessments and screening that are required by school districts to determine a student's eligibility for each of the 14 areas of eligibility recognized in the State of North Carolina. See NC 1503- 2.5 (d). For a student to qualify as eligible in the area of Autism, the District must conduct ten different screenings and evaluations, including a psychological evaluation and a "speech language"

evaluation which includes, but is not limited to, measures of language semantics and pragmatics." NC 1503-2.5(d)(1)(i)(H)-(I).

- 40. Based on the above Findings of Fact, the Board's speech language evaluation of included a pragmatic assessment and met NCDPI's requirements that the diagnostic impressions were supported by the data and information contained in the assessments conducted.
- 41. Based on the above Conclusions of Law and related Findings of Fact, Petitioners did not meet their burden of showing that the speech language evaluation conducted by Respondent required the addition of an IEP goal in pragmatic language for
- 42. Based on the above Conclusions of Law and related Findings of Fact, the absence of an IEP goal targeting pragmatic language did not render either of the IEPs developed for inappropriate.
- 43. Based on the above Conclusions of Law and related Findings of Fact, Respondent appropriately evaluated speech language skills including his pragmatic language.

#### **Functional Behavior Assessment**

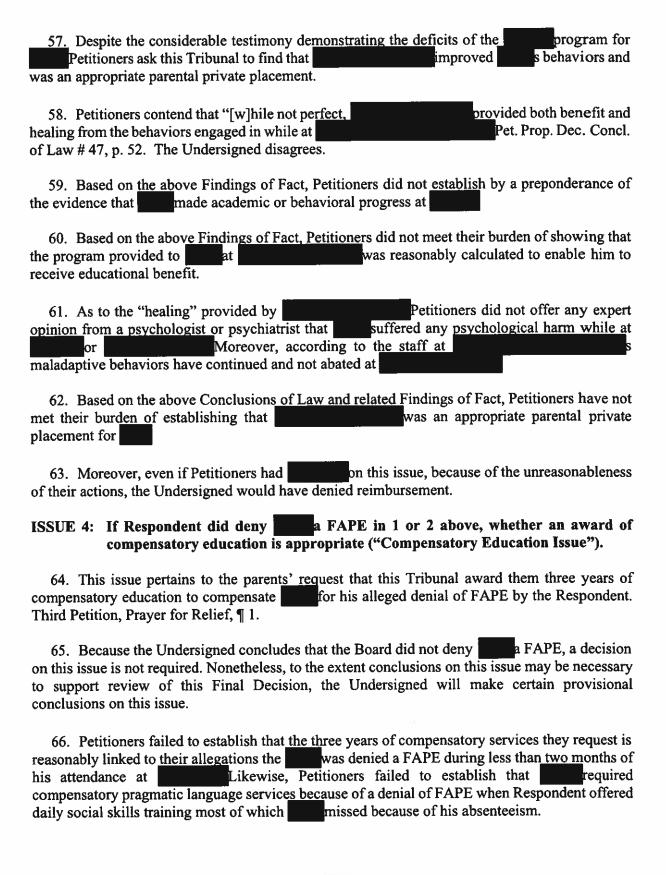
- 44. Neither the IDEA nor state regulations require that an FBA be conducted prior to development of any portion of an IEP. Rather, an FBA is required only after an IEP team has determined that a child's misconduct was a manifestation of his/her disability. See 34 C.F.R. 300.530(f).
- 45. Based on the above Conclusion of Law and Findings of Fact provided above, the absence of an FBA prior to the Board's development of the February 2 or February 25 IEPs and BSPs did not render these plans inappropriate for

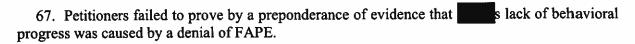
# IEP Goal, BSP, Service Delivery, Supplemental Aids/Accommodations

- 46. Based on the above Findings of Fact Petitioners failed to meet their burden of establishing by a preponderance of the evidence that the behavioral goal, service delivery, or supplemental services and accommodations were inappropriate for the evidence of rendered in IEPs inappropriate.
- 47. To the extent Petitioners alleged at hearing that the February 2 IEP was deficient because it did not provide a one-on-one aide for the Undersigned finds Petitioners did not show by a preponderance of the evidence that this support was necessary at that time. Moreover, based on the above Findings of Fact, the Undersigned finds that Petitioners failed to show how the absence of this accommodation in the February 2 IEP amounted to actual harm to since one-on-one assistance was provided when reenrolled from February 9 through February 24, 2016.

- ISSUE 2: Whether the Board failed to implement the February 2, 2016 and February 25, 2016 IEPs, and if so, whether any such failure denied ("Implementation Issue").

  48. North Carolina law permits the use of restraints for several purposes, including to prevent a student from harming himself or others or causing property damage. N.C. Gen. Stat. § 115C-391.1.
- 49. An LEA can restrain a student pursuant to N.C.G.S. § 115C-391.1 whether or not restraints are included in a BSP or BIP. According to OCS, the use of restraint was a last resort. The Undersigned gives OCS staff deference to their determination of when a CPI hold was necessary and does not find that the CPI holds/physical restraints used were inappropriate such that a new IEP or difference methods must be utilized during the relevant period. See Ex. Rel. H.C. v. Craven County Board of Education, No. 4:16-CV-282-BO, pg. 3 (E.D.N.C. August 14, 2017).
- 50. Based on the above Findings of Fact, Petitioners failed to establish by a preponderance of the evidence that any CPI hold/ physical restraint of amounted to a failure to implement a material or significant portion of significant posterior of
- 51. A district's failure to implement a "material or significant portion of the IEP" may amount to denial of FAPE. Sumter, 642 F.3d at 484.
- 52. Based on the above Findings of Fact, Petitioners failed to meet their burden of demonstrating that the Respondent failed to implement a material or significant portion of either the February 2 or February 25 IEPs or related BSPs.
- 53. Based on the above Findings of Fact, Petitioners also failed to establish by a preponderance of the evidence that any purported failure to implement the BSPs, IEPs, or other instructional strategies harmed
- 54. Moreover, based on the Conclusions of Law and Findings of Fact, Petitioners have failed to meet their burden of proving that the Respondent denied FAPE.
- If Respondent did deny as FAPE in 1 or 2 above, whether is a placement reasonably calculated to provide educational benefit for that supports an award of tuition and travel reimbursement ("Private School Issue").
- 55. Because the Undersigned concludes that the Respondent did not deny decision on this issue is not required.
- 56. Nonetheless, to the extent conclusions on this issue may be necessary to support review of the Final Decision, the Undersigned will make certain provisional conclusions on this issue.





- 68. s sporadic attendance interfered with the implementation of IEPs and BSPs and with data collection necessary to develop a FBA.
- 69. Based on the above Findings of Fact, the weight of evidence also demonstrates that parents did at times interfere with the services provided by Respondent, ultimately cancelled the FBA meeting, and ignored repeated requests to participate in the FBA meeting.
- 70. Petitioners' repeated allegations of abuse against school staff alienated the parties such that collaboration at the IEP meetings and provision of special education were significantly impeded.
- 71. Even if Respondent had denied FAPE, absenteeism and parents' unreasonable actions would warrant denial of compensatory education.

#### Other Issues

- 72. As noted earlier, events prior to the special education referral on November 5, 2015 and after the end of Petitioners' claim are not before the Undersigned, and do not form the basis for the Conclusions of Law in this Order.
- 73. This Tribunal has no jurisdiction over personal injury claims, abuse claims, criminal assault allegations and any claims not pertaining to the provision of a free and appropriate public education pursuant to the IDEA, it's supporting regulations, N.C.G.S. 115C-106 et seq., and the corresponding state regulations. Stips. 6, 7, & 9. Any such claims are not before the Undersigned and neither the Findings of Fact nor the Conclusions of Law in this Final Decision are pertinent to those claims.
- 74. The above described issues, and any other that were not specifically and properly pled in the Petitions, are not before the Undersigned in this Final Decision and will have no further part in this decision.
- 75. To the extent that this Final Decision does not expressly rule on any other claims raised in the Petitions, the Undersigned concludes that Petitioners did not meet their evidentiary burden to establish any right to relief on those claims.

**THEREFORE**, the Undersigned finds and holds that there is sufficient evidence in the records to properly and lawfully support the Conclusions of Law cited above.

#### FINAL DECISION

BASED upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

- 1. Petitioners failed to meet their burden of proof by a preponderance of the evidence that Respondent failed to provide a free appropriate public education for the 2015-2016 school year;
- 2. Petitioners' claims for private school reimbursement, related transportation expenses, and compensatory education are **DISMISSED WITH PREJUDICE**.
- 3. Any and all of Petitioners' remaining claims are **DISMISSED WITH PREJUDICE**.
- 4. Respondent is party on all issues and claims.

IT IS SO ORDERED.

#### NOTICE

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review

Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

This the 15th day of November, 2017.

В

Stacey Bice Bawtinhimer Administrative Law Judge

## **CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 15th day of November, 2017.

L G

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